Supreme Court, U.S.
FILED
05 1010 JAN 9 - 2006
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT of the UNITED STATES

Doris Isbell, Petitioner

v.

Allstate Insurance Company, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Laura B. Allen
Counsel of Record
Mead & Allen LLC
259 N. 100 East
Kanab, Utah 84741
(435) 644-3333
Attorneys for Petitioner

QUESTION PRESENTED

Whether it is illegal retaliation under Age Discrimination in Employment Act, 29 USC §623(d); Title VII of the Civil Rights Act of 1964, as amended, 42 USC §2000e-3(a); and the Americans with Disabilities Act, 42 USC §12203 for an employer to condition rehire or continuing employment, albeit in a different position, on an employee's execution of a release and waiver of rights to engage in protected activity.

PARTIES TO THE PROCEEDINGS

Petitioner is Doris Isbell.

Respondent is Allstate Insurance Company ("Allstate").

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED.....ii

PARTIES TO THE PROCEEDING.....iii

TABLE OF AUTHORITIES.....vi

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE PETITION.....8

A. The Decision in the Court Below Undermines Decisions of This Court That Broadly Interpret the Anti-Retaliation Provisions of the ADEA, Title VII and ADA and Creates a Split Between the Circuits.....8

B. The Court of Appeals' Decision Conflicts With and Undermines this Court's Decision in *Hishon v. Spalding*.....12

C. The Court of Appeals' Decision Conflicts With the Requisites of the OWPBA and Decisions of Other Courts of Appeals Interpreting the OWPBA.....13

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases **Page(s)**

A&D Davenport Tran., Inc., 256 NLRB 463 (1981) enforced, 688 F. 2d 844 (7th Cir. 1982).....10

Brock of Casey Truck Sales, 839 F. 2d 872 (2nd Cir. 1988).....9

Cronin v. ITT Corp., 737 F. Supp. 224 (S.D.N.Y. 1990) *aff'd.* 916 F.2d 709 (2d Cir. 1990).....12

Curl v. Reavis, 740 F. 2d 1323 (4th Cir. 1984).....10

EEOC v. Cosmair, Inc., 821 F. 2d 1085 (5th Cir. 1987).....14

EEOC v. Waffle House, 534 S. Ct. 279 (2002).....8

Fogelman v. Mercy Hosp., Inc., 283 F.3d 561 (3rd Cir. 2002) *cert. denied* 537 U.S. 824 (2002).....10

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).....10

Hishon v. King & Spalding, 467 U.S. 69 (1984).....3, 12, 13

Marshall v. Parking Co. of America-Denver, 670 F. 2d 141 (10th Cir. 1982).....9

McDonnell v. Cisneros, 84 F. 3d 256 (7th Cir. 1996).....11

NLRB v. St. Mary's Sewer Pipe Co., 146 F.2d 995

(3rd Cir. 1945).....10

Robinson v. Shell Oil Co., 519 U.S. 337 (1997).....8

Romero v. Allstate Insurance Company, No. 01-3894 (E.D. Pa. 2004) *rev on other grds*, *Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005).....8, 14

Sauers v. Salt Lake County, 1 F. 3d 1122 (10th Cir. 1993).....9

Veprinsky v. Flour Daniel, Inc., 87 F.3d 881 (7th Cir. 1996).....10

Statutory Provisions

28 U.S.C. 1254(1).....2

29 U.S.C. §158(a)(1).....10

29 USCS § 215(a)(3).....9, 10

29 USC §623(d).....2, 3, 5, 6, 7, 8, 11, 14

29 USC§ 626(f)(4).....3, 7, 13, 14

29 USC §1140.....3, 6, 14

42 USC §2000e-3(a).....2, 3, 5, 6, 7, 8, 11, 13, 14

42 U.S.C. § 12203.....2, 3, 5, 6, 7, 8, 10, 11, 14

IN THE
SUPREME COURT of the UNITED STATES

Doris Isbell, Petitioner

v.

Allstate Insurance Company, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Doris Isbell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Isbell v. Allstate Insurance Company*, 418 F.3d 788 (7th Cir. 2005). It is reproduced in the Appendix at App. 1. The orders of the District Court denying petitioner's motion for partial summary judgment, granting respondent's cross-motion for partial summary judgment and denying petitioner's motion for reconsideration are unreported and are reproduced in the Appendix at App. 47, 47, 16.

JURISDICTION

The court of appeals judgment was entered on August 15, 2005. App. 1. A timely petition for rehearing was denied

on October 11, 2005. App. 72. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Age Discrimination in Employment Act, 29 USC §623(d) ("ADEA"), provides: Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

2. Title VII of the Civil Rights Act of 1964, as amended, 42 USC §2000e-3(a) ("Title VII") provides: It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.

3. Americans with Disabilities Act, 42 USC §12203 ("ADA") provides: (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) Interference, coercion, or intimidation. It shall be

unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

4. Older Workers Benefits Protection Act of 1990, 29 USC §626(f)(4) provides: ....No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

STATEMENT OF THE CASE

Petitioner Doris Isbell seeks review of the ruling of the Seventh Circuit Court of Appeals which held an employer can condition rehire or continued employment, albeit in a different position, on the employee's agreement to refrain from protected activity.

Petitioner seeks review of the Seventh Circuit's ruling because it is in conflict with the rulings of this Court and other Courts of Appeal that have interpreted anti-retaliation provisions of the ADEA, Title VII, and the ADA and is contrary to the plain language of the OWBPA. Petitioner also seeks review of the ruling below because it is in conflict with and undermines this Court's decision *Hishon v. Spalding*.

The petition arises out of an action brought by Doris Isbell for violation of her rights including illegal retaliation under ADEA, Title VII, and ADA. Jurisdiction of the District Court was properly invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4); 29 U.S.C. § 626(c), (f)(3); 42 U.S.C. §2000(e)-5; 42 U.S.C. § 12117(a); and 20 U.S.C. §1132(e)(1) and (f).

After a fifteen year career at Allstate Doris Isbell, age 51, was required to convert from an employee to an

independent contractor position or leave the company. Significantly, the condition for staying with Allstate as an independent contractor was that she must sign an agreement not to engage in protected activity under ADEA, Title VII, and ADA as well as ERISA. The agreement was Allstate's Election Form Release and General Waiver ("release").

In effect, Ms. Isbell was required to agree to refrain from engaging in protected activity in order to keep a job with Allstate. There were no other requirements for conversion to independent contractor. Ms. Isbell refused to sign the release and was not allowed to convert to the independent contractor job.

During her tenure at Allstate Ms. Isbell worked as what was known as an employee agent. Prior to June 30, 2000 Allstate had two categories of agents: employee insurance agents employed under one of two contracts known as R830 and R1500 and exclusive agents who operated as independent contractors under an agreement called R3000 or R3001. Ms. Isbell worked as what was known as an employee agent under the R1500 contract. She received a base salary plus commissions and benefits to sell insurance policies in a territory in southern Illinois.

Beginning sometime in the mid 1990s Ms. Isbell's manager made clear to her she had the option to convert to an exclusive agent; her manager said the option was available to her at any time. Ms. Isbell was not during that time required to sign a release of any of her rights under any civil rights statute as a prerequisite to conversion. She was not at that time required to refrain from engaging in protected activity if she chose to convert to independent contractor. And, Ms. Isbell's manager explained to her if she converted to independent contractor, she would continue to work in the same office and handle the same customers; he told her she would continue her job as she had but the compensation and payment of office expenses would be different.

Then in November, 1999 Allstate announced a program to eliminate all of its approximately 6,400 employee

agents including Ms. Isbell. Under this program these employees were required effective June 30, 2000 to convert to independent contractors known as exclusive agents or leave Allstate; as the only prerequisite to this forced conversion, these employees were told they must execute Allstate's release. Allstate stated in its description of the program, "the terminated agent could become an independent contractor...without meeting various requirements and restrictions imposed earlier by Allstate"; the only requirement was execution of the release.

Prior to June 30, 2000, while Ms. Isbell was still working as an employee agent, Allstate sent her letter after letter indicating she could not work as an exclusive agent unless she signed the release. On May 24, 2000 after receipt of two such letters, Ms. Isbell responded she did not intend to sign the release, that she did not want to forfeit her rights to bring claims; she added she wanted, however, to work for Allstate as an exclusive agent. By way of response Allstate advised her she could not work as an exclusive agent unless she signed the release. The only obstacle to her employment as an exclusive agent was her refusal to sign the release. Ms. Isbell then responded in a May 26, 2000 letter to her manager that, in effect, she believed the required conversion to independent contractor constituted age discrimination and retaliation.

Though Ms. Isbell was willing to work as an exclusive agent, she had concerns about whether the forced conversion program constituted age discrimination. She also did not believe she should be required to agree to refrain from engaging in protected activity to keep her career at Allstate. She could not continue her career at Allstate and work as an exclusive agent and challenge even the legality of the conversion program itself. Ms. Isbell thus refused to sign the release and filed her Charge of Discrimination with the EEOC on May 26, 2000, charging Allstate's conversion program violated the ADEA and was retaliatory in violation not only of the ADEA but also Title VII and ADA.

The release broadly prohibited the employees from pursuing any "charges" or other claims "of any kind whatsoever, whether known or unknown, or whether previously asserted or unasserted, stated or unstated, arising out of, connected with, or related to, my employment and/or termination of my employment...or my transition to independent contractor status" under any law including ADEA, Title VII, ADA, ERISA and state discrimination laws. The plain language of the release prohibited the employee agents even from challenging the legality of the conversion program itself before the EEOC or otherwise. Like Ms. Isbell, nearly ninety percent (90%) of the employees agents ordered to sign the release before they could convert to independent contractor were over forty (40) years of age and nearly 2/3 of those were fifty (50) years old or older. Any employee agents who left Allstate as a result of the program were ineligible for one year for positions at the Customer Service Centers in insurance sales and service, jobs similar to that of insurance agent. As of December 31, 2002 seventy-six percent (76%) of the employees who filled the Customer Service Center jobs were under forty years old; the vast majority of these employees were in their twenties. By August 21, 2003 eighty–four percent of these new employees were under forty years old. And, in the end, more than ninety-five percent (95%) of the employee insurance agents left the company as a result of the conversion program.

There was evidence Allstate's forced conversion of aging employee agents was prompted by a belief people are not productive especially if they are over fifty (50) years old; the evidence revealed Allstate also believed an aging employee agent workforce would result in increasingly high health insurance costs. Hence Allstate's decision to force the conversion of employee agents to independent contractors.

On September 19, 2000 the EEOC issued its Determination the policy of requiring the employee agents to execute the release in order to work for Allstate as an exclusive agent constituted illegal retaliation. App. 73-74.

The EEOC determined an employee's refusal to sign the release constituted protected activity. App. 74.

On September 25, 2002 the District Court denied Ms. Isbell's motion for partial summary judgment on the issue of whether Allstate's program violated the OWBPA and was retaliatory in violation of the ADEA, Title VII, and ADA. App. 46. Instead, on March 28, 2003 the U.S. District Court for the Southern District of Illinois granted summary judgment to Allstate Insurance Company on those issues. App. 47. In its December 16, 2003 *Amended Memorandum and Order* the District Court granted summary judgment in favor of Allstate on Ms. Isbell's remaining claims and denied her motion for reconsideration of the District Court's September 25, 2002 and March 28, 2003 Orders. App. 17.

Ms. Isbell appealed the decision of the Southern District of Illinois to the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals affirmed the decision of the Southern District of Illinois and held Ms. Isbell "did not lose her job, because she refused to sign the release. She lost her job for the same reason 6,400 other employee agents of Allstate lost theirs...- because Allstate had decided to eliminate employee agent positions". App. 1, 7. The Court below characterized the forced conversion as akin to a benefit offered to a fired employee in exchange for a release. App. 7.

But Ms. Isbell does not suggest Allstate eliminated her employee agent position because she refused to sign the release. Except to dismiss it as "novel", the Court below does not address the issue Ms. Isbell raises, i.e., Allstate could not require her to refrain from protected activity as a condition of rehire or continued employment with the company whether as an independent contractor or employee. App. 7. By its silence on this issue the Court below allowed Allstate to condition an offer of rehire or continued employment albeit under a new job title and different compensation upon execution of an agreement not to engage in protected activity. App. 7.

The Seventh Circuit Court of Appeals subsequently denied a petition for rehearing or rehearing *en banc* filed by Petitioner Doris Isbell. App. 72.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Court Below Undermines Decisions of This Court That Broadly Interpret the Anti-Retaliation Provisions of the ADEA, Title VII and ADA and Creates a Split Between the Circuits.

Contrary to the decisions of the U.S. Supreme Court and other U.S. Courts of Appeals including earlier opinions by the Seventh Circuit Court of Appeals, the opinion of the Court below has sharply limited the reach of the anti-retaliation laws. The Court below allows an employer to refuse to rehire or continue employment unless an employee agrees to refrain from protected activity.

In contrast to the opinion of the Court below, this Court has required a broad interpretation of anti-retaliation provisions to ensure "unfettered access to statutory remedial mechanisms" is maintained. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). See also *EEOC v. Waffle House*, 534 S. Ct. 279, 296 n.11 (2002).

Indeed, the opinion below conflicts directly with *Romero v. Allstate Insurance Company*, No. 01-3894 (E.D. Pa. 2004) rev on other grds, *Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005). App. 63. In that case, like the EEOC in its September 19, 2000 Determination, the court found this same Allstate release violated the anti-retaliation provisions of the ADEA, Title VII, and ADA. The Court was adamant, "[I]t is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all

been threatened with such an outcome if they exercised their right to refuse to sign the proposed release." App. 67.

Those employee agents who refused to sign the release, like Ms. Isbell, were not allowed to continue their careers selling insurance at Allstate. Allstate conditioned their employment, whether it is described as a rehire or continued employment, on their agreement to refrain from anticipated protected activity. There was no other requirement for rehire or continued employment under the new contract.

The opinion below also directly conflicts with the Tenth Circuit decision in *Sauers v. Salt Lake County*, 1 F. 3d 1122, 1128 (10th Cir. 1993). There, the Court held "[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact". Allstate has done exactly this – taken action against Ms. Isbell in anticipation she would engage in protected activity. Allstate wanted to prevent her from challenging its termination of the employee agents and forced conversion. To do so, it conditioned her rehire or continuation of her career there on signing the release of Allstate from all liability. There was no other condition to her rehire or conversion to independent contractor. Except to prevent her from engaging in anticipated protected activity, there is no other reason Allstate would have required Ms. Isbell to sign the release prior to continuing her career there.

Indeed, the opinion of the Court below also conflicts with decisions in which in similar contexts other U.S. Courts of Appeals have recognized it is retaliatory for an employer to condition rehire or continued employment on execution of a release. See *Marshall v. Parking Co. of America-Denver*, 670 F. 2d 141, 142 (10th Cir. 1982)(A threat to fire employees for refusing to release claims for overtime pay violates the Fair Labor Standards Act's anti-retaliation provisions.) The Court in *Brock of Casey Truck Sales*, 839 F. 2d 872, 879 (2nd Cir. 1988) observed, "Protection against discrimination for

instituting FLSA proceedings would be worthless if an employee could be fired for declining to give up the benefits he is due under the Act."

In the context of the National Labor Relations Act, 29 U.S.C. §158(a) ("NLRA") courts have found improper coercion when employers condition reinstatement or rehire on an agreement to drop grievances. Compare *NLRB v. St. Mary's Sewer Pipe Co.*, 146 F.2d 995, 996 (3rd Cir. 1945); *A&D Davenport Tran., Inc.*, 256 NLRB 463, 463 n. 2, 467 (1981) enforced, 688 F. 2d 844 (7th Cir. 1982). (The ADA's anti-coercion provision, 42 U.S.C. § 12203(b), contains language similar to that found in the NLRA; courts have looked to the NLRA as an aid in interpreting this unique provision. See, e.g., *Fogelman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567, 569, 570 (3rd Cir. 2002) cert. denied 537 U.S. 824 (2002).)

In an analogous context, this Court has held an employer cannot establish a failure to mitigate damages when an employee refuses to accept a job that is conditioned on a release of claims against the employer. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.18 (1982). See similarly, *Curl v. Reavis*, 740 F. 2d 1323, 1331 (4th Cir. 1984).

Even earlier decisions of the Seventh Circuit Court of Appeals are in conflict with the opinion below. Contrary to the decision in *Veprinsky v. Flour Daniel, Inc.*, 87 F.3d 881, 888 (7th Cir. 1996), the Court below allowed Allstate to condition rehire or continuing employment on an agreement to refrain from protected activity.

It should be noted the Courts below focused on the termination of the employment contracts and not the offers of conversion to independent contractor in deciding the retaliation claim. The Courts below found the offers of rehire or continued employment were akin to severance or benefits offered along with a termination of employment and for which the employer can demand a release of liability. But employee agents were not, as the Courts below suggest, provided severance or benefits as consideration for signing a

release of liability for their termination. Instead, their rehire or continued employment was contingent on an agreement not to engage in protected activity.

The Courts below also focused on the timing of Ms. Isbell's protected activity in reaching their decisions. The Courts below pointed out she did not complain of age discrimination or file an EEOC charge until after she learned of the plan to terminate her employment contract; thus, reasoned the Courts below, there was no retaliation. But the point is Allstate conditioned her rehire or continued employment on her execution of a release. Ms. Isbell and any other employee agent who refused to sign the release could not continue to work for Allstate as insurance agents under the new contract. It was not the termination of the old contract that was retaliatory; it was the refusal to hire Ms. Isbell under the new contract unless she agreed to refrain from engaging in protected activity. Once she refused to sign the release, the offer of a new contract was withdrawn. It is difficult to imagine this adverse employment action does not violate the anti-retaliation provisions of the ADEA, Title VII, and ADA's broad proscription against any act which "coerce[s], intimidate[s], threaten[s], or interfere[s] with any individual in the exercise or enjoyment of" rights under the Act. 42 U.S.C. §12203(b).

If an employer is allowed to require employees to release civil rights for rehire or to continue employment, there is nothing, then, that would prevent an employer from having employees sign releases every so often to continue in their jobs. In this way employers could vitiate entirely the statutory protections for employees under the civil rights laws. Their jobs would depend on their signing away their rights under such laws. This is exactly the kind of retaliatory effect the anti-retaliation statutes seek to prevent. 29 USC §623(d); 42 USC §2000e-3(a) and 42 USC §12203.

The opinion of the Court below also conflicts with decisions concerning the definition of "protected activity" under the anti-retaliation statutes. Note *McDonnell v. Cisneros*, 84 F. 3d 256, 262 (7th Cir. 1996). In that case the

employee failed to stop his subordinate from filing discrimination charges against another manager; he did not help his subordinate, but he did not stop him. His passivity was determined to be protected activity.

Doris Isbell was far more active in engaging in protected activity. She refused to sign the release. And, Ms. Isbell wrote Allstate to advise she would continue her job under the new exclusive agent arrangement, but she would not sign the release, that she believed the conversion program constituted age discrimination. App. Her refusal to sign the release could serve no other purpose than to allow her to engage in protected activity. Ms. Isbell then filed a Charge of Discrimination. She was denied the exclusive agent position only because she refused to refrain from engaging in protected activity.

Note the Second Circuit Court of Appeals affirmed the decision in *Cronin v. ITT Corp.*, 737 F. Supp. 224, 225-227, 231 (S.D.N.Y. 1990) *aff'd.* 916 F.2d 709 (2d Cir. 1990). In that case the Court accepted a refusal to sign a release was protected activity; the employee in that case alleged, in part, the employer tried to prevent him from obtaining another job because he refused to sign a release.

B. The Court of Appeals' Decision Conflicts With and Undermines this Court's Decision in *Hishon v. Spalding.*

The opinion of the Court below conflicts with the decision of this Court, *Hishon v. King & Spalding*, 467 U.S. 69 (1984). In that case the employer law firm allegedly discriminated on the basis of sex in considering associate attorneys for partnership. Once they were partners, the law firm assumed associates ceased being employees and were no longer protected by Title VII. Nevertheless, this Court held the firm could not discriminate in how it considered its associates for partnership. *Id.* 467 U.S. at 75. This Court made clear an employer cannot "dole[] out in discriminatory fashion" "[a] benefit that is part and parcel of the

employment relationship". *Id.* "Those benefits that comprise the 'incidents of employment[]' ... or that form 'an aspect of the relationship between the employer and employees,' may not be afforded in a manner contrary to Title VII." *Id.* 467 U.S. at 75-76.

Likewise here, Allstate was not free to offer this privilege of employment of exclusive agency in a way that violated federal law. Clearly, Allstate could not offer its exclusive agent contract under the conversion program to male agents but not female agents. For the same reason, it could not withhold the offer from agents who refused to relinquish their rights to engage in protected activities.

It is difficult to see how conversion to an exclusive agent was not at least a privilege, an "'incident[]'" or an "'aspect' of the relationship to employer and employee". *Id.* Allstate had for years made clear to Ms. Isbell she had the option of converting at any time to exclusive agent status. And, again, Allstate had never before required such a release. The November, 1999 offer of forced conversion was made to Ms. Isbell because she was an employee; the only condition required for conversion was that she sign the release. Surely, if a promise to consider an employee for partnership is a privilege, "'incident[]'" or "'aspect'" of employment, then so is a firm offer to allow conversion to exclusive agent that was contingent only on execution of an agreement not to engage in protected activity. *Id.* It does not matter Allstate could have chosen not to make the offer of conversion; once it did so, according to *Hishon*, it could not withhold the opportunity from those who refused to sign the release. *Id.*

Yet, the Court below has decided contrary to *Hishon*, an employer is now free to "dole[] out" privileges, "'incidents'" or "'aspect[s]'" of employment in a retaliatory manner.

C. The Court of Appeals' Decision Conflicts With the Requisites of the OWPBA and Decisions of Other Courts of Appeals Interpreting the OWPBA.

The OWBPA is explicit that "[n]o waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 USC §626(f)(4). See further *EEOC v. Cosmair, Inc.*, 821 F. 2d 1085, 1090 (5th Cir. 1987) in which the Court was explicit "a waiver of the right to file a charge [with the EEOC] is void as against public policy."

In contrast, the Court below upheld Allstate's demand its agents including Ms. Isbell "release, waive and forever discharge" any right to bring any "charge", claim or suit for violation of their rights, in part, under ADEA, Title VII, ADA, and ERISA. There is no indication an employee can pursue a charge with the EEOC; in fact, the release specifically states an employee is barred from bringing a "charge".

Employee agents like Ms. Isbell who refused to give up their rights lost their careers; they could not work for Allstate as exclusive agents. Note that in *Romero v. Allstate*, No. 01-7042 (E.D. Pa. 2004) *rev. on other grds, Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005), the Court found this same Allstate release was voidable because by its terms it purported to require agents to release any right to bring charges before the EEOC. App. The Court in that case found this release on its face violated the OWBPA, 29 USC §626(f)(4) because it prohibited employee agents from filing "charge[s]" or at least led them to believe they could not do so. App. 67. Ms. Isbell should not have been denied rehire or conversion to independent contractor because she refused to sign an illegal release.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Dated this 9th day of January, 2006.

Respectfully submitted,

Laura B. Allen
Counsel of Record
Mead & Allen LLC
259 N. 100 East
Kanab, Utah 84741
(435) 644-3333
Counsel for Petitioner

Supreme Court, U.S.
FILED
05 1010 JAN 9 - 2006
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT of the UNITED STATES

Doris Isbell, Petitioner

v.

Allstate Insurance Company, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Laura B. Allen
Counsel of Record
Mead & Allen LLC
259 N. 100 East
Kanab, Utah 84741
(435) 644-3333
Attorneys for Petitioner

TABLE OF CONTENTS

Page

Circuit Court Opinion.....1

December 16, 2003 District Court Amended Memorandum and Order.....17

September 25, 2002 District Court Order.....46

March 28, 2003 District Court Memorandum and Order.....47

Romero v. Allstate Insurance Company, No. 01-3894 (E.D. Pa. 2004) *rev on other grds, Romero v. Allstate Corp.*, 404 F.3d 212 (3rd Cir. 2005).....63

October 11, 2005 Order Denying Rehearing or Rehearing en banc.....72

September 19, 2000 EEOC Determination.....73

DORIS ISBELL and JAMES SCHNEIDER, Plaintiffs-Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant-Appellee.

Nos. 04-2310 & 04-2365

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

418 F.3d 788

August 15, 2005, Decided

Judges: Before CUDAHY, MANION, and EVANS, Circuit Judges.

OPINION BY: MANION

OPINION: [*790] MANION, *Circuit Judge*. Doris Isbell and James Schneider are former employees of Allstate Insurance Company ("Allstate" or, the "Company"). After Allstate reorganized its workforce and abolished their positions with the company, the two sued Allstate in the United States District Court for the Southern District of Illinois. The suit alleged (among other things) claims of discrimination and retaliatory discharge. The district court granted summary judgment in favor of Allstate with respect to all of these claims, and in favor of Schneider with respect to Allstate's assertion of damages for its claim of breach of a contract by Schneider. We affirm the district court's summary judgment in favor of Allstate on Isbell's claims. We also hold, however, that Schneider did not breach his contract with Allstate and thus reverse the district court's grant of summary judgment in favor of Allstate on that claim.

I.

In November 1999, Allstate announced a company-wide plan to change the nature of its business relationship with a significant [*791] number of the people who sold insurance for it. The basic idea was that Allstate would no longer sell insurance through employees, known here as "employee agents," but would do so instead through a network of exclusive independent contractors.n1 To accomplish this conversion, the company decided to terminate, effective June 30, 2000, all of its approximately 6,400 employee agents -- regardless of age, productivity, or performance.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1The actual division of Allstate's sales force prior to the reorganization was somewhat more complicated than we have presented it here. There were, apparently, six types of contractual relationships between Allstate and its sales force (Schneider and Isbell each had a different class of contract with Allstate). In fact, one of the reasons Allstate cites for its reorganization decision was to cut down on the costs of administering these diverse relationships.

For our purposes, however, it is sufficient to say that prior to the reorganization there were two broad categories of insurance salespersons for the Company: independent contractors and employee agents. The goal of the reorganization was to make all of the Company's sales force independent contractors.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Allstate did not, necessarily, seek to completely end its relationship with the terminated employee agents. Allstate offered each of the 6,400 employee agents, including Isbell and Schneider, four options. The first two of these options

allowed an employee to enter into an independent contractor relationship with Allstate. Both options would grant the new contractors the opportunity to have an economic interest in the book of business they wrote for the company as well as certain other benefits, including a $ 5,000 bonus and the forgiveness of certain office expense advancements. The first option ("Option One) envisioned a long-term relationship with the new contractor and the Company, while the second option ("Option Two") foresaw a transitory relationship between the contractor and the Company -- the expectation was that the new contractor would sell his or her book of business to an approved buyer (presumably another Allstate contractor) and then leave the Company. The third option ("Option Three") was that the employee could terminate its relationship with Allstate and receive a year's pay as severance. The fourth option ("Option Four") also included an immediate end to the parties' business relationship and a simple severance pay-out for up to thirteen weeks' salary.

The first three options offered by Allstate required the terminated employee to sign a release (the "Release") that purported to waive any claim that an employee might have against Allstate under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. (the "ADEA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"), the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq., (the "ADA"), and the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§1140 et seq. ("ERISA"). The Fourth Option did not require the terminated employee to sign the Release. Thus, the key difference between Options Three and Four was that in order to receive a year's severance pay an employee had to sign the Release. If an employee refused to sign the Release he was entitled to the much briefer period of severance but retained the right to bring suit against Allstate for any claims he might have under the aforementioned statutes.

Allstate gave each affected employee (including Isbell and Schneider) a copy of the Release and information explaining the implications [*792] of signing (and not signing) the Release. Allstate also encouraged each employee to consult an attorney before signing the Release.

Isbell and Schneider were both informed of the termination decision in an employee meeting held by Allstate in Collinsville, Illinois sometime in November or December 1999 (the record is not clear as to precisely when, but there is no doubt that the two knew of their pending termination no later than December 1999). In the meeting, employees were told they would be fired in approximately six months and the four options set forth above were explained. Isbell and Schneider have both admitted that they knew that their particular terminations were part of this program, that they were not singled out for termination, and that they would be terminated from their current positions regardless of whether they signed the Release.

Schneider signed the Release and chose Option Two after meeting with an attorney who actually recommended that Schneider *not* sign the release. By taking Option Two, Schneider was given an economic interest in his book of business which he subsequently sold to another Allstate contractor for $ 120,000. Schneider also was given the $ 5,000 bonus and was forgiven a $ 1,000 debt with the company. Schneider admits that Allstate complied with its end of the bargain in all respects. Nevertheless, on December 14, 2000, Schneider filed an EEOC charge alleging age discrimination and retaliation.

Isbell did not sign the Release. At first, she was inclined to remain with the company as an independent contractor but did not want to have to do so at the cost of signing the Release. Because this was not possible she chose to leave the

Company. Allstate paid her the severance she was entitled to under Option Four. Before she left, however, in May 2000, she filed a claim of age discrimination and retaliation with the EEOC.

Isbell and Schneider ultimately filed the present suit. Both made claims of retaliation in violation of the ADEA, Title VII, the ADA, and ERISA, discrimination in violation of the ADEA, and unlawful termination to prevent the use of pension benefits -- an ERISA claim. Isbell also raised a claim of retaliation in violation of state law. Allstate filed a counterclaim against Schneider (but not Isbell) for breach of contract (the Release) and unjust enrichment. The district court consolidated the cases and the parties conducted discovery.

On February 19, 2002, Isbell moved for partial summary judgment on her claims of retaliation. Allstate filed a cross-motion for summary judgment in its favor. The district court ultimately denied Isbell's motion and granted Allstate's.

At the conclusion of discovery Allstate moved for summary judgment on the remainder of Isbell's claims, all of Schneider's claims, and its counterclaim against Schneider. On November 25, 2003, the district court granted Allstate's motion as to Schneider's breach of the Release. The district court ultimately ruled in favor of Schneider with respect to damages, finding that, although Schneider had breached his contract with Allstate, Allstate had shown no damages from the breach.

After the district court entered a final judgment, Isbell filed this appeal from the district court's entry of judgment on her retaliation, discrimination, and ERISA claims while Allstate has appealed the district court's denial of damages in its counterclaim against Schneider. Schneider has not appealed the decision denying his claims and he is a party to this

appeal only as a cross-appellee in Allstate's appeal.

[*793] II.

As we have just noted, Isbell and Allstate each appeal adverse rulings by the district court. We discuss each in turn.

A. Isbell's Appeal

Isbell appeals the district court's decisions to grant summary judgment in favor of Allstate on her claims of retaliation, discrimination, and violation of §510 of ERISA. We review a district court's grant of summary judgment de novo. *Jordan v. City of Gary, Ind.*, 396 F. 3rd 825, 831 (7th Cir. 2005). "Summary judgment is only appropriate where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* (quoting *Fed. R. Civ. P. 56(c)).*

1. Isbell's retaliation claim.

As with other employment-related claims (discrimination for instance), a plaintiff may proceed with a claim of retaliation pursuant to either the direct or indirect method. *Luckie v. Ameritech*, 389 F. 3d 708, 714 (7th Cir. 2004). In this case, however, because Isbell has offered no evidence of retaliation under the direct method, we proceed to the indirect method. This method requires Isbell to show: "(1) she engaged in statutorily protected activity; (2) she was performing her job according to [Allstate's] legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity." *Id.*

Given the standard we have just recited, Isbell appears to throw in the towel when she admits in her opening brief to this court that "her employment was [not] terminated in retaliation for protected activity." Instead, Isbell advances a novel theory of retaliation, claiming that Allstate retaliated against her when it refused her "the opportunity to work for Allstate albeit under a different contract unless she signed the release." Isbell thus argues that Allstate could not require her to sign the Release as a condition to becoming an independent contractor with the Company.

Isbell was not a victim of retaliation. Her reason for termination was the same for all employees at Allstate who were similarly situated. She had four options. Three of those options had various incentives and benefits in exchange for the release. In order to be valid, a release, like all agreements, must be supported by consideration. *See, e.g.*, 29 U.S.C. §626(f)(1)(D)(stating that for a release to be valid under the Older Workers Benefits Protection Act, a release must be supported by consideration). An employee who refuses to sign a release will not be offered the same deal as a terminated employee who is willing to sign the release.

It is also clear that Isbell did not lose her job, because she refused to sign the Release. She lost her job for the same reason 6,400 other employee agents of Allstate lost theirs, *including those who signed the Release* -- because Allstate had decided to eliminate all employee agent positions with the Company. Isbell's fellow plaintiff Schneider signed the Release, yet he too lost his job as an employee agent. The district court did not err in granting summary judgment in Allstate's favor on Isbell's claim of retaliation.

2. Isbell's ADEA discrimination claim.

Pursuant to the ADEA, it is unlawful for an employer "to fail or refuse to hire or to [*794] discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1). Like other similar claims, a plaintiff raising a claim of age discrimination may proceed by either the direct or indirect method. *Rhodes v. Ill. Dept. of Transp.*, 359 F. 3d 498, 504 (7th Cir. 2004); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F. 3d 309, 321 (7th Cir. 2003). Isbell has chosen the direct method.

A plaintiff utilizing the direct method may rely on either direct or circumstantial evidence. *Rhodes*, 359 F.3d at 504. As this court has noted, direct evidence of age discrimination (or any other form of discrimination for that matter) essentially requires an admission by an employer or some sort of "smoking gun" that points to discrimination. *Jordan*, 396 F.3d at 832; *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 397 (7th Cir. 1997). There was no such admission or smoking gun here.

Circumstantial evidence under the direct method is sufficient to show discriminatory intent only where the plaintiff can "construct[] a 'convincing mosaic' of circumstantial evidence that 'allows a jury to infer intentional discrimination by the decision-maker.' " *Rhodes*, 359 F.3d at 504 (quoting *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). The evidence must, however, "point directly to a discriminatory reason for the employer's action." *Id.* (quoting *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003)).

Isbell presents evidence from a series of studies conducted by Allstate, or on its behalf by consultants, that Isbell claims show that the Company believed younger agents performed better than older agents. The first study cited by Isbell was conducted by the Company in mid-1996, three and one-half years prior to the revamping of Allstate's workforce. The

results of that study were compiled in a Powerpoint n2presentation and shared with the Allstate's then-Chairman/CEO and its COO. The primary focus of the study and the ultimate conclusion appears to be that independent contractors outperformed employee agents; a conclusion that appears to foreshadow Allstate's ultimate decision to eliminate the employee-agent position and move to an all-independent contractor model of business.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Powerpoint is a computer program that allows for the construction of "slide shows," often using graphics and other devices (tables, charts, etc.) to present a report in summary fashion. The slide shows can be printed out and distributed on paper, displayed on a computer, or projected onto a screen (as in a board meeting).

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The presentation did note, however, some information concerning the age of agents which Isbell considers evidence of an intent to discriminate. The study showed the distribution of agents by tenure and average age and also noted that over 15% of the Company's agent force could retire in the next fifteen years. The study also suggested that "there is a potential generational mismatch between our agents and the new customers we seek." It noted that "productivity declines slightly by the age of the agent." The study also found, however, that "production by agent type remains constant, no matter what the agent age cohort." In other words, independent contractors had approximately the same production level regardless of the age grouping -- thirty to thirty-nine-year-old independent contractors had the same production level as forty-five to forty-nine year-old

independent [*795] contractors and likewise for employee agents. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 Without too much analysis (we are not privy to the underlying data that went into these studies), this would suggest a fairly innocuous reason for the statement that production for agents declined slightly by the age of an agent. The independent contractors outperformed their employee-agent counterparts and the independent contractor program was concentrated amongst the relatively younger employees (the program was relatively new in 1996). Thus, the decline in production numbers for all agents as they aged could be attributable to the concentration of the better performing agent types in the younger age groups. Thus, while a forty-nine year-old agent, on average, could be expected to perform as well as a thirty-year-old agent of the same type, there were more agents from the poorer performing agent types in the higher age brackets than there were better performing agent types.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The second study relied on by Isbell was a study, known as the Sale Organization of the Future (the "SOOF"), prepared for the Company in 1997 by an outside consultant. The SOOF study was much more concerned with the age of the Company's employee agents than the 1996 study. The SOOF included a presentation of agent demographics that highlighted the age distribution of the Company's agents and explored the options for eliminating the employee-agent role in the agent workforce.

Isbell also cites a 1999 study conducted by Allstate that

studied the relationship between age and productivity. Although Isbell reports that the study showed that agents in younger age groups produced "slightly more new business," Isbell failed to note the heading to that page of the study -- "overall, there is a *weak* relationship between age and production." (Emphasis added.) Isbell also failed to note that the study concluded that "focusing only on 'high potential' hires, there is little relationship between age and production." Finally, Isbell failed to cite a conclusion of the study "age should not play a role in recruiting or hiring decisions."

Taken together, this evidence does not provide a "convincing mosaic" from which a jury could infer discriminatory intent on the part of Allstate. As the district court pointed out, there was no evidence that the studies were used by the decisionmakers involved in the decision to eliminate the employee-agent program. *Fuka v. Thomson Consumer Elecs.*, 82 F.3d 1397, 1403-04 (7th Cir. 1996).

Isbell's claim that Allstate discriminated against older workers when it eliminated the employee-agent position has no merit. She seeks to magnify the age issue by focusing only on one job category without recognizing the entirety of Allstate's restructuring effort -- eliminating an employment position *and* offering those affected another position with the Company. As a consequence, every employee in that position lost his job, *regardless of age*. n4 That was not the sum of Allstate's restructuring program, however. Each and every one of the employee agents, *regardless of age*, was offered a new opportunity with the Company. Allstate was entitled to summary judgment on Isbell's claim of age discrimination.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 This is also the reason Isbell cannot succeed in showing discrimination via the indirect *McDonnell Douglas* method.

That method requires Isbell to show (among other things) that similarly situated persons under forty were treated better than she was. That is not possible here. Every person similarly situated to Isbell, over forty or under forty, was treated precisely the same way -- their position with the Company was terminated and they were offered a choice of options including a new position with Allstate.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [**18]

3. Isbell's ERISA claim.

Isbell claims that Allstate violated § 510 of ERISA when it eliminated her position [*796] because it did so, according to Isbell, for the purpose of preventing her from taking advantage of vested health benefits. Section 510 makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ." 29 U.S.C. § 1140.

The loss of benefits to an employee as a result of an employer's action is not, by itself, sufficient to prove a violation of § 510. The employer must have the specific intent to deprive an employee of his plan rights. *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998). No violation will arise where the deprivation was simply the consequence of a decision that had the incidental effect of affecting an employee's benefits. *Id.* (quoting *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991)). "The plaintiff must ultimately show that a desire to frustrate attainment or enjoyment of benefit rights contributed toward the employer's decision and can avoid summary judgment only if the materials properly before the district court construed sympathetically, allow for such a

conclusion." *Teumer v. General Motors Corp.*, 34 F.3d 542, 550 (7th Cir. 1994).

As above, a plaintiff can show a violation of § 510 pursuant to the direct or indirect method. Isbell has no direct or circumstantial evidence that Allstate eliminated the employee-agent position for the purpose of depriving her (and the other employee agents) of her pension and health care benefits. She must proceed, therefore, under the indirect method. Such method utilizes the *McDonnell Douglas* burden-shifting analysis.

A plaintiff makes out a prima facie under § 510 where she can show "that [she] (1) belongs to the protected class; (2) was qualified for [her] job position; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent to retaliate" or to prevent the use of benefits was present. *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996); *Lindemann*, 141 F.3d at 295. In a § 510 case, however, this court need not "determine whether a plaintiff has established a prima facie case where a defendant has advanced a legitimate, nondiscriminatory reason for its action." *Id.* at 296.

In this case Allstate has offered legitimate, nondiscriminatory reasons for eliminating the employee-agent position and moving to an all-independent contractor agent force. Chief among these was the higher productivity of independent contractors (and, notably, the even higher productivity for former employee agents who had voluntarily converted to independent contractors). The independent contractors were paid higher commissions than employee agents and no doubt, like many companies, Allstate believed that paying its sales force primarily through commissions spurs the salesmen to sell more. This is a legitimate business reason for Allstate's decision. Allstate was entitled to summary judgment.

B. Allstate's Appeal

Allstate appeals the district court's conclusion that while Schneider had breached his agreement with the Company (the Release), Allstate was not entitled to damages arising from that breach. Schneider wanted to have his cake and eat it too. In spite of his signing the Release he sued under the ADEA. In the meantime, he took full advantage of Option Two by selling his book and retaining the bonus (and the benefit of the forgiven loan). Allstate claims damages in the amount of $ 126,000: [*797] $ 120,000 for the economic interest in his book of business Schneider was able to sell; $ 5,000 for the bonus he was given for signing the Release; and $ 1,000 for the forgiveness of an advance Allstate had given him. Allstate does not seek attorney's fees.

The Release signed by Schneider provided that the employee "hereby releases, waives, and forever discharges Allstate . . . from any and all liability, actions, charges, causes of action, demands, damages, entitlements or claims for relief or remuneration of any kind whatsoever, . . . including . . . any claim for age or other types of discrimination prohibited under the [ADEA, Title VII, the ADA, and ERISA]." Allstate and the district court consider the Release a covenant not to sue and consequently, Allstate argues Schneider breached the covenant when he sued Allstate.

We disagree. The Release does not amount to a covenant not to sue, but rather is a release from liability for any potential past claims. While the Release gives Allstate a defense that prevents Schneider from winning, the Release does not contain plain language that amounts to an agreement not to sue. As the Eighth Circuit recently noted, "[a] release of claims and a covenant not to sue serve different purposes." *Thomforde v. Int'l Bus. Machs. Corp.*, 406 F.3d 500, 503 (8th Cir. 2005). n5 The latter does not result in breach upon the

filing of a suit. Instead, it provides Allstate with an effective affirmative defense should a claim be raised. Because the Release was a release of claims and not a covenant not to sue, Schneider did not breach the Release with his suit. Allstate received the benefit of its bargain -- an affirmative defense. n6 Summary judgment should have been granted in favor of Schneider on Allstate's claim of breach.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 In *Thomforde*, an engineer was fired as part of a reduction in force and signed a document titled "General Release and Covenant Not to Sue." *Thomforde*, 406 F.3d at 501. Similar to the Release in this case, that agreement contained a provision releasing IBM from claims arising under the ADEA. *Id.* The IBM agreement, however, went on to include another paragraph stating that "you agree that you will never institute a claim of any kind against IBM . . . including, but not limited to, claims related to your employment with IBM or the termination of that employment . . . ." *Id.* at 501-02. The court and the parties considered the first provision a release and the second a covenant not to sue.

n6 This does not mean, of course, that a party that is the beneficiary of release of liability is without all remedies -- a party that brings a suit invoking claims covered by a release may be doing so in bad faith (and subject to paying the attorneys' fees of the party covered by the release). In this case, however, Allstate admits that it did not distinguish between the cost of litigating Isbell's claim (which was not subject to a release of liability) and Schneider's claim.

III.

Allstate eliminated the positions of 6,400 employees,

regardless of their age. It then turned around and offered those same employees, regardless of age, new opportunities with the Company. This was not discrimination and Allstate did not retaliate against Isbell when it refused to hire her for one of these new opportunities after she refused to sign a release of liability. The district court did not err in granting Allstate summary judgment on Isbell's claims of retaliation and discrimination as well as Isbell's ERISA claim.

The district court erred, however, insofar as it granted summary judgment to Allstate on its counterclaim of breach of contract by Schneider. The decision of the district court to that effect is, therefore, [*798] REVERSED and it is ordered to enter judgment on that claim in favor of Schneider.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DORIS ISBELL,

Plaintiff

v.

ALLSTATE INSURANCE CO.,

Defendant.

DEC 16 2003
CLERK U.S.
DISTRICT COURT
SOUTHERN DISTRICT
OF ILLINOIS
EAST ST. LOUIS
OFFICE

No. 01-CV-0252-DRH

AMENDED MEMORANDUM AND ORDER

Herndon, District Judge:

I. Introduction

Doris Isbell and James Schneider had been working for Allstate Insurance Company ("Allstate") for more than 14 and 15 years respectively as employee insurance agents when Allstate, as part of a restructuring of its sales force, abolished their job classification. In connection with that restructuring, Isbell and Schneider filed the instant lawsuit alleging Allstate unlawfully discriminated against them in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621 et seq. and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1140 et seq. (Isbell's

Fourth Amended Complaint, No. 01-CV-0252, Doc. 48; Schneider's Complaint, No. 01-CV-0655, Doc. 1). Both Plaintiffs further claim Allstate unlawfully retaliated against them in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, ADEA, and ERISA. n1

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 On Defendant's motion for summary judgment directed at Isbell's Fourth Amended Complaint (Doc. 48), the Court dismissed Isbell's claims for retaliation under both federal and state law (Doc. 177).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Now before this Court is Defendant's combined motion for summary judgment (Doc. 187). Plaintiffs oppose this motion (Doc. 190). Plaintiffs also filed a motion to amend and supplement their opposition (Doc. 269). Defendant opposes this motion (Doc. 280). For the reasons set forth below, the Court grants in part and denies in part Defendant's motion for summary judgment and grants Plaintiffs' motion to supplement their opposition.

II. Facts n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 The parties filed a joint statement of undisputed material facts that was extremely brief (Doc. 189). In addition, Plaintiffs filed a statement of contested material facts in paragraph form, which contained citations to evidentiary

materials in the record (Doc. 191). Defendant responded in a separate paper that addressed each paragraph of Plaintiffs' statement with corresponding cites to the record (Doc. 247). The following account of the material facts of this case is taken from this Court's March 28, 2003 order (Doc. 177), the parties' joint statement, from the facts asserted by Plaintiffs which Defendant does not deny, and from the documents filed by both parties in connection with this motion.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Today Allstate markets its insurance primarily through a nationwide network of approximately 11,000 exclusive agent independent contractors (Def.'s Ex. 1 at P2). n3 The structure of the Allstate agent network, however, has evolved over the years to allow the company to adapt to the changing marketplace for insurance (*Id.*)

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 All exhibits filed by Defendant in connection with the motion will be referred to as "Def.'s Ex. ___." Similarly, all exhibits filed by Plaintiffs in connection with this motion will be referred to as "Pls.' Ex. ___."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Prior to 1984, Allstate sold its insurance products exclusively through employee agents located in Sears retail stores or in local sales offices known as "Neighborhood Sales Offices" ("NSO") (*Id.* at P3). In 1984, Allstate introduced the Neighborhood Office Agent Program ("NOA") in response to flat productivity and the aggressive use of local independent contractor sales agents by its competitors (*Id.* at P4). These

agents were accorded greater entrepreneurial discretion than the NSO program until September 1998 when Allstate agreed, after protracted negotiations with the Internal Revenue Service, to exert more control over the NOA program in order maintain the employee status of the program for tax purposes (*Id.* at P5).

In 1990, Allstate introduced the Exclusive Agency ("EA") program (*Id.* at P6). Under the EA program, new agents were typically employed under the R3000 contract under which they were employee agents for 18 months (*Id.*). After 18 months, if the agent met certain Allstate requirements as well as final company approval, the agent was offered the R3001 EA contract to represent Allstate as an independent contractor (*Id.* at P7). This program differed from Allstate's other agent programs in several respects: (1) EA agents were independent contractors, not at-will employees (*Id.* at P7); (2) EA agents acquired an economic interest in the business that they wrote as EA agents ("books of business") (*Id.* at P8); (3) EA agents received a higher commission schedule (*Id.* at P10); and (4) EA agents were not eligible to participate in Allstate's employee benefits plan (*Id.* at P11).

By January 1999, Allstate's agent sales force had evolved into at least six different programs, including (1) "R830 NSO Agents"; (2) "R830 GA Agents"; (3) "R830 NOA Agents"; (4) "R1500 NOA Agents"; (5) "R3000 EA Agents"; and (6) "R3001 EA Agents" (*Id.* at P16). In addition, Allstate's relationship with each of these agent [*7] was governed by at least four different written contracts: (1) the transitional "Allstate R3000 Exclusive Agent Employment Agreement," otherwise known as the "R3000 Agreement"; (2) the "Allstate R3001 Neighborhood Exclusive Agency Agreement," otherwise known as the "R3001 Agreement"; (3) the "Allstate Agent Compensation Agreement," otherwise known as the "R830 Agreement,"; (4) the "Agent Employment Agreement," otherwise known as the "R1500

Agreement." (*Id.* at P17).

Allstate employed both Plaintiffs as employee insurance agents under the latter two contracts. Plaintiff Isbell, a fifty-four year old woman, worked for Allstate pursuant to an "R1500" employment contract from October 12, 1985 until June 30, 2000 (Doc. 189, P1). Similarly, Plaintiff Schneider, a fifty year old man, worked for Allstate pursuant to an "R830" contract from April 1984 until June 30, 2000 (Doc. 189, P2). For all practical purposes, these contracts had similar features, including a provision that Allstate could terminate them at will (Doc. 177 at 3).

In November 1999, Allstate publicly announced that it was launching a companywide "Preparing for the Future" Group Reorganization Program ("Program") (Doc. 177 at 3). The Program, which applied in Illinois, introduced a plan to change the nature of its business relationship with those persons who sold Allstate insurance (*Id.*). Essentially, Allstate would no longer sell its insurance though employees, who received company benefits, but would do so through a network of exclusive independent contractors (*Id.*). As part of this Program, Allstate announced that it would terminate all of its approximately 6,400 employee agent contracts as of June 30, 2000 (Doc. 189, P3). The termination decision affected all employee agents across-the-board regardless of age, productivity, performance, or any other criteria, and regardless of whether they subsequently signed any release (Def.'s Ex. 1, Attachment A).

As part of the Program, Allstate presented each affected employee with written information outlining four options for its discontinued employee agent contracts, two of which allowed the employee to continue selling Allstate insurance as an independent contractor (Doc. 189, P4, Def.'s Ex. 1, Attachment A). Each individual employee agent was then

given more than six months to select, in his or her sole discretion, among the following options (Def.'s Ex. 1):

Option 1 ("Independent Contractor Option"): Under this option, the terminated employee agent could chose to become an independent contractor Exclusive Agent under an R3001S/C contract. In exchange for a release of specific claims, former agents who elected to become an independent contractor Exclusive Agent also received the following consideration and benefits, among others:
. The ability to enter into a new contractual relationship with Allstate;
. An opportunity to earn a transferable economic interest in their book of business, including the portion previously written as an employee agent, after only two years;
. A conversion bonus of at least $ 5,000;
. Forgiveness of any debts from office expense allowance advances (that otherwise would need to be repaid upon termination);
. Higher commissions and participation in a stock bonus plan;
. Moving expenses if relocation was required; and
. The opportunity to grow their business and expand in new ways including setting up local agency extensions and, if qualified, expanding to satellite agency locations.
(*Id.* at P27(a)).

Option 2 ("Sale Option"): The terminated employee could chose to become an independent contractor for a limited period of time and receive the following consideration and benefits, among others, in exchange for a release of specific claims:
. Receive the right to enter into an R3001S/C Agreement and become an R3001 EA Agent;
. Receive a bonus payment of $ 5000;
. Have debt or OEA advances forgiven;
. Be relieved of certain lease and advertising obligations incurred as an employee-agent;

. Acquire in only one month a transferable economic interest in the business written while an employee-agent; and
. Receive the right to sell his or her book of business, after one month's service as an R3001 EA Agent and prior to August 1, 2000, to an Allstate-approved buyer and then pocket the substantial sale proceeds.
(*Id.* at P27(b)).

Option 3 ("Enhanced Severance Option with Release"): the terminated agent could choose to receive enhanced severance benefits equal to one year's pay based upon the greater of the 1997 or 1998 year-end authorized compensation in consideration and exchange for executing a release.
(Def.'s Ex. 1 at P27(c)).

Option 4 ("Base Severance Option Without Release"): the terminated employee agent could chose not to sign a release and retain any or all claims they might have against Allstate, and receive base severance up to thirteen weeks.

(*Id.* at P27(d)). Schneider selected Option 2, the Sale Option (Def.'s Ex. 5, Schneider Dep. at 97:25-98:7). Isbell selected Option 4, Base Severance Option Without Release (Def.'s Ex. 6, Isbell Dep. at 139:12-19).

Allstate also presented each employee agent, including Isbell and Schneider, with a release, an Election Form-Release, which purported to waive any right such employee might have to sue Allstate, pursuant to, among other things, the ADEA, Title VII, the ADA, and ERISA (Def.'s Ex. 3). Allstate also gave each affected employee with information that explained the implications of the Election Form-Release and encouraged them to consult with an attorney prior to signing it (Def.'s Ex. 1, Attachment B). In addition, Allstate provided to each affected agent, including Isbell and Schneider, the Age Discrimination in Employment ("ADEA") Waiver Information mandated by the Older

Workers Benefits Protection Act ("OWBPA") (Def.'s Ex. 1, Attachment D).

In November or December 1999, Isbell and Schneider attended a meeting to explain the Program in Collinsville, Illinois (Def.'s Ex. 5, Schneider Dep. at 51:3-10; Def.'s Ex. 6, Isbell Dep. at 109:17-24). The meeting included a statement that all the agents' employment was terminated, but that over the next six months they could select one of the four options described above (Doc. 177 at 4). Both Isbell and Schneider admit that they understood that their positions were terminated pursuant to the Program (Def.'s Ex. 6, Isbell Dep. at 110:21-25, 112:12-18; Def.'s Ex. 4, Schneider EEOC charge). They admit that their contracts were not singled out for termination (Def.'s Ex. 6, Isbell Dep. at 149:7-9; Def.'s Ex. 5, Schneider Dep. at 54:1-11), and that they understood their contracts would terminate as of June 30, 2000, regardless of whether they signed the Election Form-Release (Def.'s Ex. 6, Isbell Dep. at 110:21-25; Def.'s Ex. 5, Schneider Dep. at 88:14-17; 144:7-10; 145:24-146:2). It is also undisputed that R830 and R1500 contracts of employee agents over and under the age of 40 were terminated pursuant to the Program (Def.'s Ex. 6, Isbell Dep. at 144:13-15; Def.'s Ex. 1 at P26).

Plaintiff Schneider, unlike Isbell, chose to sign the Election Form-Release. Prior to signing, Schneider met with an attorney, Charles Stegmeyer, who advised him not to sign the release (Def.'s Ex. 5, Schneider Dep. at 64:1-22). Notwithstanding his attorney's advice, Schneider signed the release (Def.'s Ex. 5, Schneider Dep. at 85:5-8; 90:14-16). He selected Option 2, the Sale Option. In exchange, Allstate gave Schneider an economic interest in his book of business which he promptly sold on May 11, 2000 for $ 120,000 (Def.'s Ex. 5, Schneider Dep. at 90:14-16, 97:25-98:17). In addition, Allstate paid Schneider $ 5000 as additional consideration for signing the release (Def.'s Ex. 5, Schneider

Dep. at 120:1-9). Allstate also forgave an outstanding advance (Def.'s Ex. 5, Schneider Dep. at 119:12-25).

Schneider understood he had seven days to revoke the release, but did not (Def.'s Ex. 5, Schneider Dep. at 102:6-15). He also admits that Allstate fully performed its promises in connection with his selection of Option 2 (Def.'s Ex. 5, Schneider Dep. at 122:4-9). Schneider retained and/or spent the financial benefits that he received in exchange for signing the Election Form-Release (Def.'s Ex. 5, Schneider Dep. at 119:1-121:18; 129:21-130:2). In September 2000, Schneider met with another attorney, Kevin Boyne, regarding the Election Form-Release (Def.'s Ex. 5, Schneider Dep. at 125:8-10). Mr. Boyne told Schneider that the release did not bar any claim for workers' compensation that Schneider wished to bring against Allstate (Def.'s Ex. 5, Schneider Dep. at 70:6-18). Schneider then filed a workers' compensation claim in September 2000 in which he recovered almost $ 13,000 (Def.'s Ex. 5, Schneider Dep. at 70:9-71:10; Def.'s Ex. 12, Schneider's Workers' Compensation Settlement). Thereafter, on December 14, 2000, Schneider filed an EEOC charge alleging age discrimination and retaliation on (Def.'s Ex. 4, Schneider's EEOC charge).

III. Analysis

A. Summary Judgment Standard

Summary judgment is proper where the pleadings and affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *FED.R.CIV. P. 56(c; Wyatt v. UNUM Life Ins. Co. of Am.*, 223 F. 3d 543, 545 (7th Cir. 2000); *Oates v. Discovery Zone*, 116 F. 3d 1161, 1165 (7th Cir. 1997)*(citing Chelates Corp. Citrate*, 477 U.S. 317, 322 (1986). The movant bears the burden of establishing the absence of factual issues and entitlement to judgment as a

matter of law. *Wollin v. Gondert*, 192 F.3d 616, 621-22 (7th Cir. 1999). The Court must consider the entire record, drawing reasonable inferences and resolving factual disputes in favor of the non-movant. *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055, 1057 (7th Cir. 2000); *Baron v. City of Highland Park*, 195 F.3d 333, 337-38 (7th Cir. 1999).

In reviewing a summary judgment motion, the Court does not determine the truth of asserted matters, but rather decides whether there is a genuine factual issue for trial. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 436 (7th Cir. 2000). No issue remains for trial "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Accord *Starzenski v. City of Elkhart*, 87 F.3d 872, 880 (7th Cir. 1996), *cert. denied*, 519 U.S. 1055, 136 L. Ed. 2d 608, 117 S. Ct. 683 (1997); *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994).

This standard should be "applied with added rigor" in employment discrimination cases, in which intent and credibility are crucial issues. *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 997 (7th Cir. 2000); *Miller v. Borden, Inc.*, 168 F.3d 308, 312 (7th Cir. 1999); *King v. Preferred Technical Group, Inc.*, 166 F.3d 887, 890 (7th Cir. 1999). This standard reflects the pronouncement that in employment discrimination cases, which often involve issues of motive and intent, summary judgment must be approached with caution. *Huhn v. Koehring Co.*, 718 F.2d 239, 242 (7th Cir. 1983). *Huhn* relied on an earlier case that recognized that, although summary judgment is improper in employment discrimination cases which involve the "weighing of conflicting indications of motive and intent" where a plaintiff has no evidence of

discriminatory motive to "put on the scales for weighing," summary judgment is appropriate. *Id.*

B. Schneider's Claims for Retaliation

In his Complaint, Schneider claims that Allstate's actions constituted retaliation in violation of four federal statutes: ADEA, 29 U.S.C. §§ 621 *et seq.*; ERISA, 29 U.S.C. §§ 1140 *et seq.*; Title VII, 42 U.S.C. § 2000e; and ADA, 42 U.S.C. §§ 12101 *et seq.* (No. 01-CV-0655, Doc. 1, P24). Allstate now moves for summary judgment on these claims because they rest on the same theory of retaliation advanced by Plaintiff Isbell and rejected by the Court in its March 28, 2003 Order (Doc. 177).

In its March 28, 2003 Order, the Court found the "adverse employment action of which [Isbell] complains was effectuated by Defendant long before she engaged in any protected activity." (Doc. 177 at 13). Moreover, Isbell "was not treated differently from other similarly situated employees. She was treated identically. The record is clear that all of the over 6,000 Allstate employee agents were terminated, and all were offered the same four options for what would happen after Allstate eliminated the job classification of 'employee agent.'" (Doc. 177 at 13). Thus, the Court held "the record is devoid of evidence sufficient to demonstrate that Defendant subjected [Isbell] to an 'adverse employment action' as a way for retaliating against her for signing the waiver or filing an EEOC charge." (Doc. 177 at 14).

Here, the Court finds that the undisputed facts in connection with Schneider's retaliation claims weigh even more strongly in favor of summary judgment than those in Isbell's case. First, unlike Isbell who rests her retaliation claims, in part, on her refusal to sign the Election Form-Release, Schneider signed the Election Form-Release in April 2000 after

consulting with an attorney (Def.'s Ex. 5, Schneider Dep. at 59:8-15; 64:1-4; 76:2-4). Second, unlike Isbell, Schneider did not file his EEOC charge until almost eight months after he signed the Election Form-Release, almost seven months after he sold his economic interest in the book of business for $ 120,000, and almost three months after he successfully filed a workers' compensation claim against Allstate (Def.'s Ex. 4, Schneider's EEOC charge). Schneider has not demonstrated why his claim is distinguishable from Isbell's. Under these facts, and for the reasons set forth in this Court's March 28 Order, the Court cannot find that Allstate took an "adverse employment action" against Schneider in retaliation for signing the waiver and/or filing an EEOC charge.

Further, the Court declines to entertain Plaintiffs' request to reconsider its March 28, 2003 ruling. The Seventh Circuit has explained that "'motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.'" *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (citation omitted); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). In order to succeed on a motion for reconsider, a plaintiff must either (1) present newly discovered evidence; or (2) establish a manifest error of fact or law. *See Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Here, Plaintiffs have offered neither new law nor new facts. Nor have they suggested that the Court made a manifest error of law or fact. The Court will not allow Plaintiffs to continue to relitigate the same issues under the guise of a summary judgment motion. Accordingly, the Court declines to reconsider its previous ruling and finds Allstate is entitled to judgment as a matter of law on Schneider's federal retaliation claims.

C. Schneider's ADEA, Title VII, ERISA, and ADA Claims

1. Schneider's Waiver of his ADEA, Title VII, ERISA, and ADA Claims

Allstate argues that Schneider's waived his ADEA, Title VII, ERISA, and ADA claims by signing the Election Form-Release. Under the Program, Allstate offered each affected agent the same four post-employment termination options (Doc. 177 at 4). One option, the base severance option, did not require a signed Election Form-Release (*Id.*). The other three options required the terminated employee to sign an Election Form-Release, which provided:

In return for consideration that I am receiving under the Program, I hereby release, waive and forever discharge Allstate . . . from any and all liability . . . arising out of, connected with, or related to, my employment and/or termination of my employment . . . including any claim for age or other types of discrimination prohibited under the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Employment Retirement Income Security Act ("ERISA") . . .

(Def.'s Ex. 3). Schneider selected Option 2 and signed the Election Form-Release on April 24, 2000.

a. Waiver of ERISA, Title VII, and ADA Claims

In response to Defendant's summary judgment motion, Schneider "does not dispute Defendant's claim [that he] ratified the Release and Waiver as to his non-ADEA claims." (Doc. 190 at 18 n.3). Thus, even if the Election Form-Release was invalid at the time Schneider signed it, he subsequently ratified it by receiving and retaining over $ 120,000 in financial benefits and admits this in his response. This admission is dispositive as to Schneider's waiver of his ERISA, Title VII, and ADA claims. *See Fleming v. United*

States Postal Serv. AMF O'Hare, 27 F.3d 259, 260 (7th Cir. 1994) (ratification defense bars Title VII claim); *Maloney v. R.R. Donnelley & Sons Co.*, 1999 U.S. Dist. LEXIS 1120, 1999 WL 58551, at *7 (N.D. Ill. Feb. 3, 1999)(Conlon, J.) (by retaining the benefits of signing the release plaintiff ratified the release and could not escape release's bar of his claims). Accordingly, the Court finds Schneider waived his ERISA, Title VII, and ADA claims as a matter of law. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 Even though the Court finds Schneider waived his ERISA claim, the Court will consider the substance of the claim below.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

b. Waiver of ADEA claims

While employees are also free to waive their ADEA rights, the waivers must comply with the Older Workers Benefits Protection Act ("OWBPA"). *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999). Indeed, waivers are enforceable under the OWBPA only if they are entered into knowingly and voluntarily. *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 669 (7th Cir. 1998). At a minimum, the following requirements must be met: (a) the waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual; (b) the waiver must specifically refer to rights or claims arising under this chapter; (c) the waiver must be limited to rights or claims arising before the waiver is executed; (d) the individual must be given consideration over and above what the individual already is entitled to; (e) the individual must be advised in

writing to consult an attorney prior to executing the agreement; (f) the individual must be given a set period of days to consider the agreement; and (g) the individual must be allowed to revoke the waiver within 7 days after its execution. *Lloyd v. Brunswick Corp.*, 180 F.3d at 896 (citing 29 U.S.C. § 626(f)(1)). The OWBPA further provides that "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class employees," each employee must be "given a period of at least 45 days within which to consider the agreement," as well as detailed information concerning eligibility for the program and other factors bearing on an informed choice of whether to participate in it. 29 U.S.C. § 626(f)(1)(F)(ii), (H).

Here, Schneider does not dispute that Allstate complied with OWBPA, but argues that his release was not voluntary or knowing. Specifically, Schneider asserts that there was no negotiation, he was unsure of the legal effect of signing release, and he was under duress. In considering whether the release was knowing and voluntary, courts apply the totality of the circumstances standard. Thus, courts look at the following factors: (1) the employee's education and business experience; (2) the employee's input in negotiating the agreement; (3) the clarity of the agreement; (4) the amount of time the employee had for deliberation before signing the release; (5) whether the employee actually read the release and considered its terms before signing it; (6) whether the employee was represented by counsel or consulted with an attorney; (7) whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract law; and (8) whether the employee's release was induced by improper conduct on defendant's part. *Pierce v. Atchison, T. & S.F. Ry.*, 65 F.3d 562, 571 (7th Cir. 1995).

In this case, the Court finds that the undisputed facts and circumstances, establish that Schneider's waiver was

knowing and voluntary. The Election Form-Release is unambiguous, and indeed emphatic, that it released all of Schneider's discrimination claims. Schneider, a college graduate and an experienced businessman, had over fifteen years experience as an insurance agent (Def.'s Ex. 5, Schneider Dep. at 7:21-25; 8:17-18; 8:23-25). In November 1999, when Allstate informed Schneider that his contract with Allstate was terminated and that he could chose one of four post-termination options, Schneider carefully reviewed the Election Form-Release and considered his options for more than six months (Def.'s Ex. 5, Schneider Dep. at 59:8-25; 75:12-76:15; 97:19-98:7). Further, Schneider consulted with an attorney who recommended against signing the release (Def.'s Ex. 5, Schneider Dep. at 59:8-18; 64:1-4). Against the attorney's advice, Schneider signed the Election Form-Release on April 24, 2000 (Def.'s Ex. 5, Schneider Dep. at 90:14-16). In exchange, Schneider received economic benefit from Allstate, including: (1) an economic interest in the book of business, which he did have as employee agent (Def.'s Ex. 5, Schneider Dep. at 24:8-22); (2) the ability to sell his newly acquired economic interest in his book of business for $ 120,000; (3) a conversion payment of $ 5,000; and (4) forgiveness of an earlier advance made to Schneider for his Office Expense Allowance (Def.'s Ex. 5, Schneider Dep. at 121:1-20). Lastly, Schneider admits that Allstate fully performed its obligations (Def.'s Ex. 5, Schneider Dep. at 122:4-9).

Schneider responds to this overwhelming evidence by arguing that he "had absolutely no input in negotiating the terms of the agreement." (Doc. 190 at 19). Allstate does not dispute this. However, this fact standing alone does not mean, without more, that consent was unknowing and involuntary. *See* Fortino v. Quasar Co., 950 F.2d 389, 395 (7th Cir. 1991)(holding lack of negotiation cannot be the sine qua non of an effective waiver); *see also* Rivera-Flores v. Bristol-Myers Squibb Carribean, 112 F.3d 9, 13 (1st Cir.

1997)(concluding that although there was little room for negotiation with respect to release signed by laborer, consent was knowing and voluntary). Likewise, Schneider's statement that he was "unsure of the legal effect of signing the release" fails to create a genuine issue of material fact (Doc. 190 at 19). The Court notes that it finds it hard to believe that Schneider was confused as to whether he could pursue an ADEA claim, when the plain language of the Election Form-Release states he could not. It is also clear that Schneider understood, as a result of Allstate's urging, that he had the opportunity to obtain counsel regarding his purported questions about the legal effect of the Election Form-Release. In any event, even a mistaken belief as to the legal effect of a release cannot be a basis on which to void a release, "otherwise no releases, no accords and satisfactions, no contracts, period, would be enforceable against a party who became dissatisfied with the deal he had struck." *Fortino v. Quasar Co.*, 950 F.2d 389, 394-395 (7th Cir. 1991).

The Court also finds Schneider's defense of duress unavailing as a matter of law. Schneider testified that "the duress that I was under was I didn't feel like I had a choice in signing [the Election Form-Release] or not. If I didn't sign it I was terminated, if I did sign it my life was basically turned upside down anyway as far as financial capabilities, as far as continuing with Allstate." (Def.'s Ex. 5, Schneider Dep. at 88:21-25). In essence, Schneider's defense boils down to his concerns that the termination would result in financial hardship. In Illinois, economic duress is present "when one is induced by a wrongful act of another to make a contract under circumstances which deprive him of the exercise of free will, and a contract executed under duress is voidable." *Resolution Trust Corp. v. Ruggiero*, 977 F.2d 309, 313 (7th Cir. 1992)(citation omitted). In order to prevail on a claim of economic duress, Schneider must demonstrate Allstate's wrongful conduct left him "bereft of the quality of mind essential to making a contract." *Id.* (citation omitted).

Under these facts, the Court concludes that Schneider's personal economic burdens do not rise to the level of "duress" for purpose of invalidating a termination release. *See Grant v. Potter*, 2002 U.S. Dist. LEXIS 6200, 2002 WL 535093, at *6 (N.D. Ill. April 10, 2002) (Darrah, J.) ("fact that [plaintiff] needed a job to meet her financial obligations does not establish the defense of duress"). Here, Schneider had a choice between four different alternatives, two of which allowed him to stay with Allstate, and another which allowed him to forgo signing the release. Schneider chose the former. He cannot now claim, after he received the benefit of that bargain, that he was pushed into the decision. *See Pierce*, 65 F.3d at 569 ("one cannot successfully claim duress as a defense to a contract when he had an alternative to signing the agreement."). n5 Accordingly, the Court finds that Schneider signed a valid waiver with respect to his ADEA claims. However, for completeness sake, the Court will assume that the waiver was not valid, and consider Schneider and Isbell's discrimination claims.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n5 Schneider's assertion that Allstate "cleverly hid its discriminatory intent" is legally irrelevant to the issue of duress.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

2. Statute of Limitations

Allstate also argues that Schneider's claims are barred by the statute of limitation. Title VII and ADEA do delineate certain prerequisites before an individual may sue. For one thing, a plaintiff must file a charge with the EEOC within 300 days of

the alleged discriminatory act. *See* 42 U.S.C. § 2000e-5(a); 29 U.S.C. § 626(d)(2); *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 449 (7th 1990). The limitations period begins to run from the communication of the termination decision to the employee. *Del. State College v. Ricks*, 449 U.S. 250, 258, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995).

Here, Allstate announced the Program to Schneider, and the rest of the affected employee agents, in November 1999. Yet Schneider did not file his charge with the EEOC until over 360 days later, on December 14, 2000 (Def.'s Ex. 4). Schneider now tries to defeat the explicit time limitations by claiming he learned of the termination in late winter, early spring (Schneider Decl. at P4). While the Court agrees with Allstate that the statute of limitation began to run when Schneider learned of his impending termination in the Fall of 1999 and thus are untimely, the Court will go on to consider the substance of Schneider's claims.

D. Schneider and Isbell's Discrimination Claims

1. ADEA

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Under a disparate treatment theory, as is the case here, plaintiffs must prove that their age "'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" *Balderston v. Fairbanks Morse Engine Division of Coltec Indus.*, 328 F.3d 309, 321 (7th Cir. 2003) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 147 L. Ed. 2d 105,

120 S. Ct. 2097 (2000) (citation omitted)). Stated differently, to succeed on an ADEA claim, a plaintiff must establish that he would not have been terminated "but for" his employer's intentional age-based discrimination. *Id.* (citing *Chiaramonte Bed Group., Inc.*, 129 F.3d 391, 396 (7th Cir. 1997)).

To prove age discrimination, a plaintiff may present either direct or circumstantial evidence. *Id.* Most often, direct evidence "requires an admission by the decisionmaker that his actions were based on age." *Id.* Here, Plaintiffs have not presented any direct evidence of discrimination, rather Plaintiffs' case consists entirely of circumstantial evidence. While the Seventh Circuit has recently indicated, "where circumstantial evidence of discriminatory intent is relied on, generally the burden shifting [or indirect] method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817, is applied" *Id.* (citing *Reeves*, 530 U.S. at 142), prior precedent indicates that the direct method may apply. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). Thus, the Court will analyze Plaintiffs' claims under both methods.

a. Direct Method

Under the direct proof method, plaintiffs may show either acknowledgment of discriminatory intent by defendant or its agents or circumstantial evidence the provides the basis for an inference of intentional discrimination. *See Troupe*, 20 F.3d at 736. There are three types of circumstantial evidence of intention discrimination: (1) "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" *Id.* (citing *Giacoletto v. Amax Zinc Co.*, 954 F.2d 424 (7th Cir. 1992); *Holland v. Jefferson National Life Ins. Co.*, 883 F.2d 1307, 1314-15 (7th Cir. 1989)); (2) "evidence, whether or not rigorously

statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment;" *Id.* (citing *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 728 (7th Cir. 1986)); (3) "evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristics and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." *Id.* (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, , 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); *Ayala v. Mayfair Molded Products Corp.*, 831 F.2d 1314, 1318 (7th Cir. 1987)). "Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the case) to support a judgment for the plaintiff; or they can be used together." *Id.*

Plaintiffs in this case did not present any circumstantial evidence of the second or third type -- that is, either comparative or pretext. Rather, Plaintiffs evidence consists of random bits and pieces of information generated in connection with a series of earlier initiatives not directly related to the Program, including a study commissioned by Allstate in 1996 regarding agent productivity and the sales organization of the future ("SOOF") initiative in 1997-1998. Plaintiffs allege that this evidence demonstrates that Allstate unlawfully correlated age with productivity, and thus can be used as direct evidence of discrimination. Among other things, Plaintiffs point to Powerpoint presentations created in connection with the 1996 study that correlates a slight decline in productivity with age (Pls' Ex. 2) and states "there is a potential generational mismatch between [Allstate] agents and the new customers [Allstate] seeks" (Pls' Ex. 1). Plaintiffs also rely extensively on presentations generated by an outside consultant, McKinsey Company, in connection with the SOOF initiative arguing that these served as

precedent to Allstate's decision to convert the agent workforce to independent contractors.

The Court finds, however, that Plaintiffs have failed as a matter of law to provide evidence to support an inference of intentional discrimination. As an initial matter, many of the documents Plaintiffs rely on were generated by outside consultants, not Allstate (*See, e.g.*, Pls.' Ex. 7-19, 22-24, 26-27). But more importantly, Plaintiffs have failed to show how these documents, many marked draft, can be attributed to the employment decision challenged in this case. *See* Cowan v. Glenbrook Sec. Servs., Inc., 123 F.3d 438, 443 (7th Cir. 1997) ("This evidence 'must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question.'") To the contrary, the undisputed evidence shows that in November 1999, Allstate decided to restructure its sales force (Doc. 177 at 3). As part of this Program, Allstate terminated all of its 6,000 employee agent contracts and offered those employees the choice to continue to work for Allstate as independent contractors. (*Id.* at 4). The Court finds the record does not support the conclusion that Allstate implemented the Program in order to "get rid of older agents" because it believed they were "less productive," but offered the same affected agents the opportunity to become Allstate exclusive agent independent contractors. Furthermore, there is no evidence that Plaintiffs' proffered documents were used by any Allstate decisionmaker to implement the Program. *See* Hunt v. City of Markham, Illinois, 219 F.3d 649, 652 (7th Cir. 2000)("The fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation. That is simple common sense.") In sum, the Court finds that no rational trier of fact could reasonably infer from the evidence that Allstate fired Plaintiffs because the latter were members of a protected class, in this case the class of those over the age

of 40.

The Court's conclusion is not changed by the four exhibits offered by Plaintiffs in their Motion to Amend and Supplement Plaintiffs' Combined Memorandum in Opposition to Defendant's Motion for Summary Judgment Against Doris Isbell and Defendant's Motion for Summary Judgment Against James Schneider (Doc. 269). Assuming these exhibits are properly before the Court, Plaintiffs have not shown why the composition of Allstate's call center workforce is relevant to Allstate's decision to restructure its insurance agent workforce. This job classification existed before Allstate decided to restructure its agent workforce. There is no evidence that the call-center employees replaced the terminated agents or that they even had the similar job requirements. Similarly, the Court rejects Plaintiffs assertion, exemplified in Exhibit 4, that Allstate's decision was somehow motivated by the disproportionate numbers of those over the age of 40 then employed as sales agents. The uncontroverted evidence establishes that all employee agents were terminated regardless of age. The antidiscrimination laws were not meant to bind an employer to a particular business model that is unproductive or not cost effective because the composition of an employer's workforce disproportionately favors a particular group. Accordingly, the Court cannot conclude that Plaintiffs produced sufficient circumstantial evidence under the "direct method" to raise a triable issue on their claims.

b. Indirect Method

Under the *McDonnell Douglas* approach, a plaintiff-employee must first establish a *prima facie* case of employment discrimination. "This requires proof of four elements: (1) the employee is a member of the protected class (in an ADEA case, employees over 40 years of age, *see* 29 U.S.C. § 631(a)); (2) the employee was performing at a

satisfactory level; (3) the employee was subject to an adverse employment action; and (4) the employee was treated less favorably than younger, similarly situated employees." *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569, 574 (7th Cir. 2003). If the plaintiff succeeds in making out *prima facie* case, n6 the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. If the employer can offer such a reason, "the plaintiff . . . bears the ultimate burden of showing that it is pretext for discrimination." *Schuster*, 327 F.3d at 574 (citing *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876 (7th Cir. 2002)). "To show pretext in a RIF case, an employee must establish that an improper motive tipped the balance in favor of discharge' or that 'the employer did not honestly believe in the reasons it gave for firing him.'" *Id.*

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 A plaintiff may not jettison the *prima facie* analysis and move directly to the pretext inquiry. To the contrary, this Circuit has held that "if a plaintiff is unable to establish a *prima facie* case of employment discrimination under *McDonnell Douglas*, an employer may not be subject to a pretext inquiry." *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 327 (7th Cir. 2002).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Here, Plaintiffs cannot establish the fourth factor of their prima facie case-that they were treated differently than similarly situated persons outside the protected class. It is undisputed that the contracts of affected employee agents younger than 40 years old were also terminated as part of the Program (Def.'s Ex. 1 at P26; Def.'s Ex. 2 at PP6, 10).

Indeed, this Court has already held that "plaintiff [Isbell] was not treated differently from other similarly situated employees. She was treated identically. The record is clear that all of the over 6,000 Allstate employee agents were terminated, and all were offered the same four options for what would happen after Allstate eliminated the job classification of 'employee agent." (Doc. 177 at 13). Plaintiffs admit that they were treated identically to the other 6,000 employee agents affected by the Program (Def.'s Ex. 6, Isbell Dep. at 149:10-17; Def.'s Ex. 5, Schneider Dep. at 54:5-11). Therefore, Plaintiffs' age discrimination claims fail as a matter of law. *See* Bennington v. Caterpillar, Inc., 275 F.3d 654, 659 (7th Cir. 2001)(plaintiff cannot establish a violation of the ADEA if he cannot put forth evidence that similarly situated employees were treated more favorably); *Harris v. Franklin-Williamson Human Servs., Inc.*, 97 F. Supp.2d 892, 905 (S.D. Ill. 2000) (Herndon, J.)(rejecting discrimination claim where plaintiffs could not prove similarly situated employees outside the class were treated more favorably).

The Seventh Circuit's holding in *Blackwell*, 152 F.3d 666 (7th Cir. 1998), further supports the Court's finding. In *Blackwell*, the defendant bank decided to eliminate the position of branch manager. At the time of this decision, there were seven branch managers, five of whom were over 40 (plaintiffs), and two who were under 40. As part of its reorganization, the bank offered to all of the branch managers the opportunity to enter into a new position with the company, or to quit early. In affirming summary judgment in favor of the employer on plaintiffs' claims of age discrimination, the *Blackwell* court considered as dispositive the fact that while *some* of the terminated branch managers were under 40 years old and *some* were in the protected class, "all were subjected to the change and all decided to quit." *Id.* at 671. The Court held that if "jobs are abolished by a reduction in force, or if job classifications are abolished, the workers competing to remain employed are in the same

position as workers applying for a new job." *Id.* at 672. Under these circumstance, older workers simply "have no entitlement to preferential consideration for these jobs." Here, the "bank created a new job and offered it to the incumbents of the old jobs whatever their age, all of whom, again *whatever their age*, turned it down." *Id.* The Court concluded that "job was the plaintiffs' for the asking" and they cannot complain that they were discriminated against if the job went to other persons after the rejected them. *Id.* Simply put, the Court finds that as in *Blackwell*, Plaintiffs have not stated a valid claim of ADEA discrimination.

2. ERISA

Section 510 of ERISA provides, in pertinent part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan.

29 U.S.C. § 1140. In enacting section 510, Congress' primary aim was to prevent "'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights'" or other benefits. *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 127 (7th Cir. 1991) (quoting *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991)). Thus, section 510 of ERISA protects employees against dismissal by employers who seek to limit costs of health benefits by preventing the use of such benefits. *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 295 (7th Cir. 1998).

To prove a violation of section 510, plaintiffs must demonstrate that their employers terminated them with the specific intent of preventing or retaliating for the use of benefits. *See Little v. Cox's Supermarkets*, 71 F.3d 637, 642

n.3 (7th Cir. 1995). In other words, "plaintiff must ultimately show that a desire to frustrate [the plaintiff's] attainment or enjoyment of benefit rights contributed toward the employer's decision and [the plaintiff] can avoid summary judgment only if the materials properly before the district court, construed sympathetically, allow for such a conclusion." *Id.* Further, when establishing intent under section 510 of ERISA, proof of pretext is required. *Id.* at 643. Such proof may be direct of circumstantial. *Id.*

Circumstantial evidence of discrimination can be presented through the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-4, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and applied by the Seventh Circuit in *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996). *Lindemann* v. Mobil Oil Corp., 141 F.3d 290, 296 (7th Cir. 1998). To make out a prima facie case under section 510, plaintiff must show that he (1) belongs to the protected class; (2) was qualified for his job position; and (3) was discharged or denied employment under circumstances that provide little basis for believing that the prohibited intent to retaliate was present. *Id.* (citation omitted). "However, it is unnecessary for this Court to determine whether a plaintiff has established a prima facie case where a defendant has advanced a legitimate, nondiscriminatory reason for his action. *See Grottkau*, 79 F.3d at 73. 'Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did is no longer relevant. *Id.* (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983))." *Id.*

As stated earlier, the Court has already found that Allstate established that Isbell and Schneider were dismissed as part of a restructuring of its agent sales force - a legitimate nondiscriminatory reason (Doc. 177). n7 Plaintiffs have offered no evidence to show Allstate's decision was

impermissibly motivated by a desire to deprive those agents of their health care benefits. Indeed, the documents offered by Plaintiffs suffer from the same infirmities as those offered in support of their ADEA claim, namely Plaintiffs fail to show how they even remotely relate to the employment decision in question. None of the documents Plaintiffs presented were created in connection with or refer to the Program. Nor were the documents shared with those initiating the Program. In short, Plaintiffs' evidence neither establishes the prima facie case nor demonstrates that Allstate's proffered legitimate, nondiscriminatory business reason for implementing the program was pretextual. No action for ERISA lies where, as here, the alleged loss of a right is a mere consequence of the employment termination. *Lindemann*, 141 F.3d at 297; *Meredith*, 935 F.2d at 127. Accordingly, the Court will deny Plaintiffs' ERISA claims.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 Under the circumstances present here, the Court declines to use its discretion to require Plaintiffs to exhaust their administrative remedies as a prerequisite to bringing a civil action to enforce section 510 of ERISA. *See Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 138 (7th Cir. 1997).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

E. Allstate's Counterclaim for Breach of Contract

Allstate claims that Schneider is liable for breach of contract in connection with his Election Form-Release. Under Illinois law, the elements of breach of contract are: (1) the existence of a valid and enforceable contract; (2) performance by plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to plaintiff. *Henderson-Smith & Assoc., Inc.*

v. Nahamani Family Serv. Center, Inc., 323 Ill. App. 3d 15, 752 N.E.2d 33, 43, 256 Ill. Dec. 488 (Ill App. Ct. 1st Dist. 2001) (citation omitted). The Court has already found the Election Form-Release was valid and enforceable. The plain language of the Release prevented Schneider from filing a lawsuit against Allstate pursuant to the ADEA, ERISA, ADA, and Title VII (Def.'s Ex. 3). Thus, Schneider breached the agreement by bringing the instant suit. It is also clear that Allstate fully performed its obligations under the contract (Def.'s Ex. 5, Schneider Dep. at 122:4-9). While the Court finds that Allstate has proven liability, it has not provided any proof in connection with the issue of damages. The Court therefore denies Allstate's motion without prejudice and reserves ruling on the issue of damages until a later date.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part** Defendant Allstate's combined motion for summary judgment against Plaintiffs Doris Isbell and James Schneider (Doc. 187). The Court also **GRANTS** Plaintiffs' motion to amend and supplement their opposition (Doc. 269). All other pending motions are **DENIED** as moot at this time. The parties are permitted to refile these motions to the extent that they relate to viable issues still before the Court. The Court also directs all parties to attend a conference on **Friday, December 19, 2003 at 10:00 a.m.** in order to discuss the remaining issues in the case and to set a schedule for their timely resolution.

IT IS SO ORDERED.

Signed this 16th day of December, 2003.

s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DORIS ISBELL,

Plaintiff

v.

ALLSTATE INSURANCE CO.,

Defendant.

FILED
SEP 25 2002
CLERK U.S.
DISTRICT COURT
SOUTHERN DISTRICT
OF ILLINOIS
EAST ST. LOUIS
OFFICE

No. 01-CV-0252-DRH

ORDER

Herndon, District Judge:

Before the Court today is Plaintiff's motion for partial summary judgment on liability alone with respect to both counts of her Fourth Amended Complaint. (Doc. 68). The Court DENIES the motion.

IT IS SO ORDERED.

Signed this 25th day of September, 2002.

s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DORIS ISBELL,

Plaintiff

v.

ALLSTATE INSURANCE CO.,

Defendant.

FILED
MAR 28 2003
CLERK U.S.
DISTRICT COURT
SOUTHERN DISTRICT
OF ILLINOIS
EAST ST. LOUIS
OFFICE

No. 01-CV-0252-DRH

MEMORANDUM AND ORDER

Herndon, District Judge:

I. Introduction

Plaintiff 's Fourth Amended Complaint contains two counts. In Count One, Plaintiff Doris Isbell seeks recovery from her former employer, Allstate Insurance Co., for alleged violations of four federal employment statutes in connection with Allstate's decision to terminate her employment as an agent. Count Two seeks recovery on a state law retaliatory discharge theory, alleging that Allstate terminated Plaintiff to retaliate against her for refusing to waive and release her Workers Compensation claim. Now before this Court is Allstate's motion for partial summary judgment on liability with respect only to the retaliation claims in Counts I and II of the Fourth Amended Complaint. (Doc. 87). Allstate does not

seek summary judgment on the non-retaliatory claims in Count I. Plaintiff responded to Allstate's motion, and the Equal Employment Opportunity Commission ("EEOC") filed an amicus brief urging the Court to rule for the Plaintiff on her federal retaliatory claims. For the reasons set froth below, the Court GRANTS Allstate's motion. (Doc. 87).

II. Facts

The parties filed a Joint Statement of Material Facts that was extremely brief (Doc. 91). In addition, Defendant filed its own lengthier "Proposed Joint Statement of Undisputed Material Facts," which contained citations to evidentiary materials in the record. (Doc. 92).
Plaintiff filed a Response to Defendant's statement, also with record citations. (Doc. 93). Plaintiff listed "uncontested" as a response to only three of Defendant's asserted facts, and objected to the rest on such grounds that they were not relevant or omitted other information that would put the asserted facts in greater context. However, Plaintiff specifically denied only one of the Defendant's Statements of Fact. (Doc. 93, ¶26, Response). The Court carefully examined the various statements of fact and the factual materials on which hey are based, some of which were attached as exhibits in support of Plaintiff's summary judgment motion. (Doc. 68).[1] The following account of the material facts of this case is taken from the parties' Joint Statement, from the facts asserted by the Defendant which Plaintiff did not deny, and from documents filed by Plaintiff in support of her motion.

Plaintiff worked for Defendant Allstate as an employee insurance agent, and her duties included selling Allstate Insurance policies. (Doc. 91, ¶1). As an employee, Plaintiff received certain standard employment benefits. (Doc. 68, Plaintiff's Exhibit 1, ¶2(b)). The employment contract

[1] The Court denied this motion on September 25, 2002.

governing this relationship included an employment "at-will" provision.

In addition, you employment and this Agreement may be terminated at will by either party, subject only to such limitations and restrictions as may be imposed by law, and in accordance with Company rules and procedures. Termination shall be effective upon giving notice of termination orally or in writing, delivered personally or mailed to the last known address of the other.

In November, 1999, Allstate publicly announced that it was launching a companywide "Preparing for the Future" Group Reorganization Program ("Program"). (Doc. 93, ¶6). The Program, which applied tin al states except West Virginia and Montana, included a plan to change the nature of its business relationship with those persons who sold its insurance. (Doc. 93, ¶¶7-10). Essentially, Allstate would no longer sell its insurance through employees, who received company benefits, but would do so through a network of independent contractors. (Doc. 93, ¶¶4-5). As a part of this plan, Defendant announced that all its employee agent contracts were terminated, with an effective date of June 30, 2000, over six months later. (Doc. 93, ¶8). The terminations of all the employee agents were effective without regard to whether or not they signed an agreement Allstate sought which would broadly waive and release any right they may have had to sue Allstate, specifically including the ADEA, Title VII, the ADA, and ERISA. (Doc. 93, ¶8); (Doc. 68, Plaintiff's Exhibit 4). The release applied only to past claims, not to claims that may arise after it was signed. (Doc. 68, Plaintiff's Exhibit 4).

As part of this Program, Defendant also offered four distinct options for its terminated employee agents, two of which included continuing to sell Allstate insurance not as an employee, but as an independent contractor....The four options were: (1) Become an independent contractor exclusively selling

Allstate insurance, including an opportunity to earn a transferable economic interest in one's book of business and a conversion bonus of $5,000; (2) Become an independent contractor for a limited period of time with an opportunity to acquire and sell an economic interest in a book of business on an accelerated basis; (3) Severance payment of one year's salary; and (4) Severance payment in a smaller sum. (Doc. 93, ¶10). The first three options required the employee agent to sign the release of all past liability claims against Allstate, but the fourth did not. (Doc. 93, ¶¶12-15). Thus, if an employee agent wished to continue selling Allstate insurance or receive a year of severance pay, she had to sign the release. Those who chose not to sign the release would receive much lower severance pay. (Doc. 93, ¶12). The terminated employees had six months of continued employment with Allstate to make their choice from those four options.

In November or December, 1999, Plaintiff attended a meeting to explain the Program in Collinsville, Illinois. (Doc. 93, ¶19). The meeting included a statement that all the agents' employment was terminated, but that over the next six months they could select one of the four options described above. (Doc. 93, ¶20). Plaintiff testified at her deposition that she understood at that meeting, held in November or December, 1999, that her employment at Allstate had been terminated. (Doc. 91, ¶21); *Isbell Deposition*, pp. 110, 112.

Q: Ms. Isbell, your employment contract was going to be terminated regardless of whether you signed the release. Do you understand that?

A: Right....

Q: Did you understand, notwithstanding anything that Mr. Smith may have said, that your employment with Allstate was going to terminate as o June 30, 2000, whether or not you signed the release?

A: Yes, we were aware that the contract was changing as of June 30th. Everybody was aware of that. Everybody knew that.

Q: The contract was not just changing, the contract was being terminated?

A: Terminated, right; exactly.

Q: And you knew that?

A: That's what we received, yes. That was the information we received.

Q: And you knew that was going to happen regardless of whether you signed a release or waiver?

A: Exactly; yes.

Isbell Deposition, pp. 203-04.

Plaintiff notified Allstate on May 24, 2000 that she did not intend to sign the release, but wanted to continue with Allstate as an independent contractor. (Doc. 68, Plaintiff's Exhibit 13). The next day, an Allstate manager reminded Plaintiff that the release was required if she wished to continue working with Allstate as an independent contractor, and that her work with Allstate on any basis would end on June 30, 2000, if she did not sign it. (Doc. 68, Plaintiff's Exhibit 15). On May 26, 2000, Plaintiff notified Allstate that she would not sign the release, that she no longer intended to be an independent contractor, but that she wished to continue working under her old employment contract. (Doc. 68, Plaintiff's Exhibit 16). Five days later, Plaintiff filed a charge of retaliation and age discrimination with the E.E.O.C. (Doc. 68, Plaintiff's Exhibit 17). Plaintiff ceased working for Allstate on June 30, 2000. (Doc. 91, ¶4).

Seven months before Allstate announced the Program, on April 15, 1999 Plaintiff filed a report claiming she sustained a work-related injury. (Doc. 91 ¶3). She filed an application for workers compensation benefits some time later. Doc. 91, ¶3). Plaintiff received workers compensation benefits prior to November, 1999, through June 30, 2000. (Doc. 93, ¶23).

III. Analysis

The Court can grant summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law." **Fed. R. Civ. P. 56(c; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).** To determine whether a genuine issue of material fact precluding summary judgment exists, the Court must construe all facts in the light most favorable to the Plaintiff, the nonmoving party, and draw all reasonable and justifiable inferences in her favor. **Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).**

In Count I, Plaintiff claims that the Defendant's actions constituted retaliation in violation of four federal statutes: **the Age Discrimination in Employment Act ("ADEA"); 29 US.C. §§621 et seq.; E.R.I.S.A., 29 U.S.C. §§ 1140 et seq.; Title VII, 42 U.S.C. §2000e et seq.; and The Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101 et seq.**; (Doc. 48, ¶23). She also claims that the Defendant's acts constituted age discrimination in violation of the **ADEA**, and "discharge, discrimination" in violation of **E.R.I.S.A**. (Doc. 48, ¶¶9-14, 23). In Count II, the Plaintiff asserts a state-law retaliatory discharge claim, that Defendant terminated her in retaliation for refusing to sign a release that would bar her from proceeding with the Workers Compensation claim. (Doc. 48 ¶¶29-32) The Court will consider the federal retaliatory discharge claims first, and will set forth its reasons for rejecting the arguments in the EEOC's *amicus* brief.

A. The Federal Claims of Retaliatory Discharge

The Seventh Circuit frequently speaks to the law as it relates to claims of retaliatory discharge, and it did so recently in examining two distinct methods by which such a claim may be established. **Rogers v. City of Chicago, 320 F. 3d 748, 753 (7th Cir. 2003).** The first, the "direct method," includes two types of evidence: direct evidence and indirect evidence. Direct

evidence is defined as "that, if believed by the trier of fact, would prove the fact in question without reliance on inference or presumption." **Rogers, 320 F. 3d at 753, quoting Walker v. Glickman, 241 F. 3d 884, 888 (7th Cir. 2001).** Such evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus," **Radue v. Kimberly-Clark Corp., 219 F. 3d 612, 616 (7th Cir. 2000),** and is rarely encountered. **Rogers, 320 F. 3d at 753.** However, plaintiffs using the "direct method" may also produce circumstantial evidence, that is, "evidence that allows the jury to infer intentional discrimination by the decisionmaker." **Id. at 753.**

Plaintiffs unable to establish a case by the "direct method" may also proceed by the "indirect method." **Rogers, 320 F. 3d at 754.** The indirect method also authorizes two types of evidence. In **Stone v. City of Indianapolis Public Utilities Division, 281 F. 3d 640, 644 (7th Cir. 2001)(Posner, J.),** the Seventh Circuit provided a detailed explanation of the indirect method.

The plaintiff in a retaliation case should have two (and only two) distinct routes to obtaining/preventing summary judgment. One, the more straightforward, the one that is unrelated to *McDonnell Douglas,* is to present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complains. If the evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendant presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.

The question of how much evidence the plaintiff must present to establish a triable issue that the adverse employment action of which he complains was retaliatory is not susceptible of a general answer. But we remind that mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue. See *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882, 2001 WL 1381076, at *9 (7th Cir. 2001) ; *Pugh v. City of Attica*, 259 F.3d 619, 630 (7th Cir. 2001); *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001); *Sauzek v. Exxon Coal USA, Inc., supra*, 202 F.3d at 918; *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1136, 1147 (7th Cir. 1997); but cf. *Lalvani v. Cook County*, 269 F.3d 785, 790 (7th Cir. 2001); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 653-54 (7th Cir. 2001). This is the rule in other circuits as well, see *Cardenas v. Massey*, 269 F.3d 251, 264 (3d Cir. 2001); *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363-64 (6th Cir. 2001); *Bradley v. Widnall*, 232 F.3d 626, 633 (8th Cir. 2000), though not uniformly. See *Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208, 224 (2d Cir. 2001); *Bass v. Board of County Commissioners, supra*, 256 F.3d at 1119; *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998)....The second route to summary judgment, the adaptation of McDonnell Douglas to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner.

Stone, 281 F. 3d at 644. The Court will analyze the Plaintiff's retaliation claims under both the direct and indirect methods.

1. The "Direct Method"

Taking the "direct method" first, Plaintiff may produce either direct evidence or indirect evident. As noted, direct evidence, usually construed as a confession of impermissible motive, is extremely rare. **Rogers, 320 F. 3d at 753.** Plaintiff presented none of this kind of evidence here. There is no indication that anyone on behalf of Allstate confessed that the company's reason for implementing the Program was to retaliate against any employee who refused to release federal discrimination claims or filed charge with the EEOC. Therefore, the Court must whether there is sufficient circumstantial evidence that would allow a jury to infer that Allstate intentionally retaliated against her. **Id.**

At first glance, the temporal proximity of Plaintiff's notice that she did not intend to sign the release and the filing of her EEOC charge to the end of her employment might seem suspicious. However, that suspicion dissolves when viewed in the factual context of this case. That context shows that the temporal proximity of these events is coincidental, not causal, and that the Defendant's decision to terminate Plaintiff and the other employee agents preceded Plaintiff's protected conduct.

Plaintiff's admissions as to what she learned shortly after Allstate announced its Program make this point clear. Plaintiff attended an Allstate employee meeting in Collinsville, Illinois, in November or December of 1999, in which Allstate explained the new Program. Plaintiff learned at that meeting that she would no longer be employed under her employment contract as of June 30, 2000, "regardless of whether [she] signed a waiver or release or not." *Isbell Deposition*, p. 110. Plaintiff also understood at the November 1999 meeting that the termination applied to all of Allstate's more than 6,000 employee agents – not just to her. *Isbell Deposition*, p. 112. Thus, Plaintiff understood as early as November, 1999 that Allstate was eliminating the job of employee agent across the board no matter what she did – regardless of whether she had any claims, would or would not sign any releases, or file any EEOC charges at some future date. The challenged conduct – Defendant's decision to terminate Plaintiff's employment –

occurred long before Plaintiff engaged in the protected activity of choosing not to sign a release and filing an EEOC charge.

The Seventh Circuit has characterized as "simply misconceived" a similar retaliation claim in which the protected activity – filing a claim of age-related employment discrimination – occurred after the challenged action that gave rise to the retaliation claim. **Salvato v. Illinois Dept. of Human Rights, 155 F. 3d 922, 925 (7th Cir. 1998).** The same characterization is appropriate here. There is no dispute that Plaintiff notified Defendant of her intention not to sign the release and filed her EEOC claim approximately six months after she understood that her employment contract would be terminated.

Plaintiff's response to this point is complicated, but equally misguided. She argues that Allstate's entire course of conduct relating to asking the employee agents for a release was a scheme to retaliate against her for refusing to waive her rights to sue. (Doc. 89, passtm). However, Plaintiff also admits that "there does not appear to be any cases that discuss such a retaliatory scheme." (Doc. 89, p. 7). Therefore, the Court must rely on statutory and binding Seventh Circuit authority that an employer may validly seek a release of past discrimination claims, even where it eliminates a job classification. **29 U.S.C. §626(f)(setting forth conditions for valid waiver of ADEA claims): Blackwell v. Cole Taylor Bank, 152 F. 3d 666 (Posner, C.J.)(discussing waiver of discrimination claims where employer eliminated an entire job classification and offered existing workers new positions with different requirements); Oberg v. Allied Van Lines, 11 F. 3d 679 (7th Cir. 1994)(discussing statutory requirements for valid waivers of age discrimination claims).** Without deciding whether Allstate's proposed release was valid,[2] the Court notes that there is no question that Plaintiff had ample time –

---

[2] Plaintiff agrees that this issue is not now before the Court. "Ms. Isbell, however, never signed the release; the validity of the release is not even an issue."(Doc. 89, p. 5).

approximately six months – to decide whether or not to sign it, and that it appears to be supported by consideration. The employees who chose to sign the release received either enhanced severance benefits or the opportunity to continue working with Allstate as independent contractors with the opportunity to acquire a marketable book of business. Those who, like Plaintiff, chose not to sign the release received a smaller severance package – and preserved whatever right they may have had to sue Allstate. Thus, on the undisputed facts, the Court cannot accept Plaintiff's characterization of Allstate's conduct as a massive, prohibited retaliatory scheme.

Plaintiff also claims that Allstate's "scheme" to deprive its employees of its right to sue disproportionately affected older workers, since 90% of its employees were over the age of 40. (Doc. 93, ¶10, Response, et passim). Presumably this fact is alleged in an attempt to provide circumstantial evidence of Defendant's motive to retaliate against its older employees. However, the only support Plaintiff cites for this factual assertion is a statement in her affidavit. (Doc. 68, Isbell Affidavit, ¶18). The Court cannot find a triable issue in this allegation. "It is well-settled that conclusory self-serving affidavits, without support in the record, do not create a triable issue of fact." **Hall v. Bodine Elec. Co., 276 F. 3d 345, 354 (7th Cir. 2002).** The Court cannot conclude that Plaintiff produced sufficient circumstantial evidence under the "direct method" to raise a triable issue on her retaliation claims.

2. The "Indirect Method"

The Court has determined that Plaintiff cannot establish a triable case using the "direct method" described in **Rogers v. Chicago**. It must now examine whether she can establish a case under the "indirect method" set forth in **Stone v. City of Indianapolis Public Utilities Division. Stone** also described two forms of evidence available, the first being "direct evidence" – "evidence that establishes without resort to inferences from circumstantial evidence[] that [Plaintiff]

engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which [s]he complains. **Stone, 281 F. 3d at 644**. Plaintiff has not presented "direct evidence" under this method. The adverse employment action of which Plaintiff complains was effectuated by Defendant long before she engaged in any protected activity. Moreover, Plaintiff understood that her status as an employee would be terminated regardless of whether she engaged in any protected activity. Therefore, the Plaintiff did not engage in protected activity as "as a result suffer[] the adverse employment action of which [s]he complains." **Id.**

The Court also believes that Plaintiff did not present sufficient evidence of the other kind described by **Stone**: "that after filing the charge only [s]he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though [s]he was performing [her] job in a satisfactory manner." **Id**. In this case, Plaintiff was not treated differently from the other similarly situated employees. She was treated identically. The record is clear that all of the over 6,000 Allstate employee agents were terminated, and all were offered the same four option for what would happen after Allstate eliminated the job classification of "employee agent". Plaintiff understood that Allstate was terminating all the agents' employment contracts months before she gave notice that she would not sign the release and filed her EEOC claim. Allstate's decision to terminate Plaintiff and her 6,000 fellow employees was made independently of her own decision not to sign the release and to file the EEOC claim.

Plaintiff has failed to raise a genuine dispute of material fact on her federal retaliation claims. The record is devoid of evidence sufficient to demonstrate that Defendant subjected her to an "adverse employment action" as a way of retaliating against her for refusing to sign the release or for filing the EEOC charge. Allstate simply made a company-wide decision to eliminate the job of all employee agents and proceed with

the business of selling insurance through independent contractors. Defendant is entitled to judgment as a matter of law on the federal retaliation claims in Count I.

3. The EEOC's *Amicus* Brief

The Court granted the EEOC's motion for leave to file an *amicus* brief supporting Plaintiff's theory of the case. The EEOC strongly argues that the Court should rule that Allstate was engaged in a scheme to retaliate against the employees who chose not to sign the release and waiver, and that refusing to sign the release was "protected activity" (Doc. 150). Because the Court rejects the EEOC's argument on the first point, there is no need to consider the EEOC's second argument.

The Court does not accept the EEOC's characterization that Allstate fired Plaintiff solely because she refused to sign the release. (Doc. 150, p. 2). As discussed about, the undisputed facts indicate that Allstate terminated Plaintiff and all of its over 6,000 other employee agents because t hey had the status of being "employees." Put simply, Allstate c hose to change the structure of its sales force. Its decision to terminate Plaintiff occurred months before she notified the company that she would not sign the release, and, as Plaintiff acknowledged, her employment contract as terminated regardless of whether she chose to sign the release.

The EEOC argues that Allstate's decision to re-hire its employees only if they signed the release was an "adverse action" because it withheld from them the right to entire into a new economic relationship for engaging in protected activity. (Doc. 150, p. 9). In making this argument, the EEOC places particular reliance on **Hishon v. King & Spaulding, 467 U.S. 69 (1984).** The issue in **Hishon** was whether considering plaintiff for a partnership in her law firm was a "term, condition, or privilege" of her employment as an associate attorney sufficient to trigger Title VII. The Supreme Court held that the plaintiff had sufficiently alleged that partnership

consideration was such a "term, condition, or privilege" and on that basis reversed the dismissal of her complaint.

Hishon is clearly distinguishable from the case at bar. Prior to the termination, Allstate's relationship with the Plaintiff was governed by the employment contract. (Doc. 68, Plaintiff's Exhibit 1). This contract is a "term, condition, or privilege" of her employment as an agent. To the contrary, the employment contract was terminable at the will of either party, "subject only to such limitations and restrictions as may be imposed by the law and in accordance with Company rules and procedures." (doc. 68, Plaintiff's Exhibit 1, ¶11). Thus, **Hishon's** holding is inapplicable here.

This point illustrates a fundamental problem with the EEOC's position. The EEOC's retaliation argument depends on the proposition that the Plaintiff had a right to continue in an employment relationship with Allstate after it decided to eliminate her job in a company-wide reorganization. According to the EEOC, "the adverse action Plaintiff challenges is her opportunity to continue to work as an Allstate agent after the conversion from employee-agents to independent contractor agents." (Doc. 150, p. 7). However, the undisputed facts in the record indicate that Plaintiff simply did not have the right to continue working for Allstate after it decided to reorganize its sales force. Such a right is nowhere reflected in her "at-will" employment contract and it is not represented in any other materials before the Court.

The EEOC asks the Court to accept that Plaintiff somehow had the right to continue working for Allstate indefinitely. Only by accepting this position is it even conceivable to view the termination as retaliation. As discussed above, this characterization of the facts is not supported by the record. Allstate decided to eliminate from its sales force the position of employee agent. Plaintiff understood that was what Allstate wanted to do, and she agreed at her deposition that her employment contract would come to an end regardless of whether she signed the release. Her termination was the result of a unilateral decision by her employer – a harsh decision

perhaps, but one authorized by the "at-will" employment agreement Plaintiff signed. It is undisputed that Allstate made this decision long before Plaintiff gave notice that she would not sign the release. Allstate's pre-existing decision cannot be characterized as an act of retaliation for a subsequent act.

For the same reason, the Court must reject the EEOC's analogy between the case at bar and **Solon v. Gary Community School Corp., 180 F. 3d 844 (7th Cir. 1999).** The EEOC asserts that this case means "employers may not...force employees to accept [early retirement or other departure incentives] or penalize those who decline the offer; such individuals are entitled to continue working without discrimination." (Doc. 150, p. 13). Be that as it may, the relevance of Solon to the case at bar is severely compromised by its markedly different facts. The plaintiff in Solon were public school teachers presented with an allegedly discriminatory early retirement program, not with the total elimination of their position in the school system and the offer of different jobs. **Solon, 180 F. 3d at 851-53**. The Solon plaintiffs may well have been "entitled to continue working without discrimination" at the same jobs they already had. **Id. at 853**. The same cannot be said for the Plaintiff in this case, whose employment was terminable at will, and whose employer chose to reorganize its sales force by eliminating her position altogether. The option of continued employment at the same job is not a factor here.

Fundamentally, the EEOC's argument requires one to accept that there was no difference between being an Allstate employee and an independent contractor selling Allstate insurance. As the EEOC states, "In fact, the record reflects that the work was not fundamentally different; both before and after the reorganization, the agents worked selling Allstate insurance." (Doc. 150, p. 13). The Court disagrees. There is a clear difference between being an employee-at-will under a contact granting to the employer "all business produced under the terms of [the] agreement."(Doc. 68, Plaintiff's Exhibit 1, ¶3 (b)), and a self-employed independent contractor with a

marketable book of her own insurance business. Plaintiff was not offered the same job she already had. Because the Court has concluded that Allstate's decision to eliminate Plaintiff's job and terminate her contract occurred months before she gave notice that she would not sign the release, it must reject the EEOC's invitation to rule that Allstate engaged in retaliatory conduct against her.

B. State-Law Retaliatory Discharge: Workers Compensation

Defendant also moved for summary judgment on Plaintiff's state-law claims in Count II. ...Defendant is entitled to a judgment as a matter of law on the state-law retaliation claim.

IV. Conclusion

The Court **GRANTS** the Defendant's motion for partial summary judgment on Plaintiff's retaliation claims. (Doc. 87). The case will now proceed only with respect to Plaintiff's non-retaliatory federal claims contained in Count I of the Fourth Amended Complaint.

IT IS SO ORDERED.

Signed this 28th day of March, 2003.

s/ David R. Herndon
DAVID R. HERNDON
United States District Judge

GENE R. ROMERO, et al. v. ALLSTATE INSURANCE COMPANY, et al. GENE R. ROMERO, et al. v. THE ALLSTATE CORPORATION, et al. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. ALLSTATE INSURANCE COMPANY,et al.

CIVIL ACTION NO. 01-3894, CIVIL ACTION NO. 01-6764, CIVIL ACTION NO. 01-7042

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

March 30, 2004, Decided
March 30, 2004, Filed

OPINION: MEMORANDUM AND ORDER

Fullam, Sr. J.

March 30th, 2004

The three above-captioned actions arise from a common set of facts, and have, in effect, been consolidated. Civil action 01-3894 will be referred to herein as "Romero I"; civil action 01-6764 will be referred to as "Romero II," and civil action 01-7042 will be referred to as "EEOC." This opinion deals with pending motions in all three cases.

I. FACTUAL BACKGROUND

For many years, Allstate Insurance Company hired, as its employees, all of the agents who sold its insurance policies, handled claims, etc. Management apparently came to believe that its interests would be better served by agents who were independent contractors, rather than employees. All newly-

retained agents thereafter were deemed to be independent contractors. The employee-agents operated under one or the other of two types of employment contracts, designated the R830 and the R1500. The independent-contractor agents operated under R3001 contracts (after a brief period of actual employment, as trainees, under an R3000 contract).

Beginning in 1991, Allstate amended its pension plan, allegedly in order to comply with the Tax Reform Act of 1986 and implementing IRS regulations, to make clear that service as an independent-contractor agent under an R3001 contract would not be credited toward pension entitlements or calculations. The amendments also made it more difficult for covered employees to qualify for early retirement benefits and phased-out certain particularly favorable features of the early retirement benefits (which had enabled some employees to retire at age 55, but have their retirement benefits calculated as if they had continued to work until age 63).

After having adopted the policy of hiring only independent contractors in the future, Allstate also embarked upon a plan to persuade employee agents to switch to independent-contractor status, by offering financial inducements (e.g., a payment of $ 5,000, and more generous commissions on sales). Although some employee-agents made the switch, many others did not.

By 1999, the situation was as follows: of the approximately 15,000 agents nationwide, approximately 6,200 continued as employee-agents, under either the R830 or the R1500 contract. In November 1999, Allstate announced its "Preparing for the Future" Reorganization Plan, under which the employment of all employee-agents would be terminated as of June 30, 2000. Each such employee-agent was offered a choice: if the agent signed a comprehensive release, he or she could (1) sign an R3001 contract and continue in the service of Allstate, (2) serve as an R3001

independent-contractor for a brief period, and then sell his or her interest in their book of business to a buyer approved by Allstate (frequently, another Allstate agent), or (3) sign an R3001 contract but then immediately resign, in exchange for severance pay amounting to one year's earnings, to be paid monthly over a period of two years. Agents who refused to sign the release were simply discharged as of June 30, 2000, with little or no severance pay.

Confronted with these choices, most of the employee-agents (99.7%) signed releases. Only 19 agents did not sign, and several of their cases have been disposed of in the interim. As of the present date, the parties estimate that there are 16 potential claimants who did not sign releases.

In Romero I, the 29 named plaintiffs seek to represent a class which includes the 6,200 former employee-agents, to nullify all of the releases, and to pursue a wide range of claims: for breach of contract, for violations of the ADEA, ADA, Title VII and ERISA. As can readily be seen from the foregoing recital, the proposed class includes persons who did not sign the release, persons who signed the release and continue in the service of Allstate as independent contractors, persons who sold their blocks of business to other agents and then resigned, and persons who not only continue in the service of Allstate as independent contractors, but who have purchased blocks of business from retiring former agents. The class-action issues will be addressed below.

In Romero II, plaintiffs seek to represent a class of persons whose rights under ERISA were allegedly violated by the changes in the pension plan, and by their changes in status.

In its case, the EEOC contends that requiring the employee-agents to release all their claims under the ADEA, the ADA and Title VII in order to continue working as sales agents constituted retaliation in violation of § 4d of the ADEA, §

503a of the ADA, and § 704a of Title VII, and also constituted interference, coercion, and intimidation in violation of § 503b of the ADA. Attached to the EEOC complaint is a list of the 300-odd persons who filed charges with the EEOC - on whose behalf, presumably, the EEOC brought its lawsuit.

II. DISCUSSION

A. Validity of the Releases

An overarching issue in all of these cases is the validity and enforceability of the releases signed by most of the affected employee-agents. Obviously, if the releases are enforceable, only the 16 remaining agents who did not sign the releases could possibly prevail in this litigation. Defendants contend that this issue is not appropriate for class treatment, because of the conflicting interests of the putative class members, many of whom have no desire to be restored to the status quo ante. I believe, however, that the issue can properly be addressed on a class-wide basis by way of a declaratory judgment. That is, if the releases are found to be unenforceable, a declaratory judgment to the effect that they are voidable at the option of each class member would benefit those who wish to sue Allstate, without harming those who choose not to do so.

I conclude, further, that the releases should indeed be voidable at the option of the employee-agent. In the first place, the releases, on their face, violate § 626 of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626 ("OWBPA") and 29 C.F.R. § 1625.22(i)(2), which provides "no waiver agreement may include any provision prohibiting any individual from ... filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC."

Allstate contends that it had no intention of precluding the filing of charges, and notes that more than 300 employee-agents did file charges with the EEOC, without any repercussions. The difficulty with this argument, however, is that we have no way of knowing how many other employee-agents failed to pursue charges before the EEOC simply because they accepted the release language at face value.

Moreover, as the EEOC points out, it is illegal to either retaliate, or threaten to retaliate, against an employee to prevent him from exercising rights under the EEOC, Title VII, ADEA, ADA, etc. Those employees who did not sign releases were in fact treated less favorably than those who did sign, and the signers had all been threatened with such an outcome if they exercised their right to refuse to sign the proposed release.

I conclude, therefore, that the releases are voidable. Defendants' motion for summary judgment with respect to all claims by persons who signed releases will therefore be denied, and plaintiffs' motion for partial summary judgment on that issue will be granted, to the extent of a declaratory judgment as discussed above.

B. Substantive Issues

Entering declaratory judgment to the effect that the signed releases are voidable at the option of the signing employee does not, of course, signify that any of the employees actually have valid claims to assert. It is therefore appropriate to consider whether any of the claims asserted in the various complaints are subject to summary dismissal. I have concluded that some of them are indeed vulnerable to dismissal.

1. ADEA Claims

I have concluded that, on the undisputed facts of record, there is no basis for claims of age discrimination, for the simple reason that employees of all ages were treated alike. An employer who visits adverse consequences upon all employees, irrespective of age, cannot be held liable for age discrimination. The fact, if it is a fact, that many of the affected employees, or even a majority, are within the protected age group, is irrelevant. On this point, I agree with the November 25, 2003 decision of Judge Herndon in the related case of Isbell and Schneider v. Allstate Insurance Co., (U.S.D.C. Southern District of Illinois, No. 01-cv-00252).

2. The Claims in Romero II

To the extent that the plaintiffs in Romero II complain about the amendments to the pension plan made in 1991, 1994, and 1996, their complaint, filed December 20, 2001 is, on its face, time-barred. To the extent that they lost pension entitlements when they became independent contractors or former employees, that consequence would be an element of damages if they establish that their change of status was a breach of contract or otherwise illegal - claims which are being asserted in Romero I and the EEOC action. I conclude that Romero II should be dismissed in its entirety.

3. Breach of Contract

If, as Allstate contends, the employment of all employee-agents was terminable at will, then Allstate's action in terminating all those contracts on June 30, 2000 was entirely permissible. Plaintiffs contend, on the other hand, that the R830 and R1500 contracts were not at-will, but only terminable for cause. They note that the review procedures specified in the R830 contract clearly prevents at-will terminations, and that the same provisions were included in the manual which accompanied the R1500 contracts. The present record does not permit resolution of this issue on

summary judgment. Although the language of the two forms of contract was drafted by Allstate, and ambiguities should be resolved in favor of the employees, it is also possible that parol evidence not yet in the record may shed light upon the issue.

4. Allstate's Counterclaim

In its counterclaim, Allstate seeks damages against the persons who signed releases, to the extent that they have, or may in the future, sue Allstate, contrary to the terms of the releases. Inasmuch as I have determined that the releases are voidable, plaintiffs' motion for summary judgment dismissing the counterclaim will be granted. Allstate's later motion for leave to amend its counterclaim will be dismissed as moot.

C. Class Action Issues

In accordance with the foregoing discussion, I will certify a class under 23(b)(2) with respect to the voidable releases, so that any former employee-agent who signed such a release may, by notifying Allstate in writing within 90 days, effectively rescind the release (including, of course, repayment of all sums received in exchange for the release). If a sufficiently large number of agents rescind their releases, plaintiffs may apply for certification of a Rule 23(b)(3) class, when the contours of such a putative class will have been clarified.

A class consisting of the 16 remaining persons who did not sign releases will be certified, under Rule 23(b)(3), with respect to all issues not summarily disposed of herein. In all other respects, plaintiffs' applications for class certification will be denied without prejudice to a later motion for class certification, in accordance with the views expressed above.

The accompanying Order is intended to implement the views expressed above.

ORDER

AND NOW, this day of March 2004, IT IS ORDERED:

1. Civil Action No. 01-6764 ("Romero II") is dismissed with prejudice.

2. In all other respects, defendants' motion for summary judgment is denied.

3. The motions for partial summary judgment filed by plaintiffs in Civil Action NO. 01-3894 ("Romero I") and the EEOC in Civil Action No. 01-7042, are granted, to the extent of the declaratory judgment being entered as a separate document.

4. Plaintiffs' motion to dismiss defendant's counterclaim is granted. Defendant's counterclaim is dismissed with prejudice.

5. Defendant's motion for leave to file an amended counterclaim is dismissed as moot.

6. Counsel for plaintiffs shall submit a proposed order certifying a Rule 23(b)(3) class consisting of those former employee-agents who did not sign releases.

7. Except as above set forth in this Order, all pending motions are dismissed.

John P. Fullam, Sr. J.

DECLARATORY JUDGMENT

AND NOW, this 30th day of March 2004, IT IS ORDERED, ADJUDGED AND DECLARED that:

1. The releases signed by the former employee-agents of Allstate Insurance Company pursuant to the "Preparing for the Future" Reorganization Plan are voidable at the option of the persons who signed the releases.

2. Each employee-agent who signed such a release may rescind the release by taking the following action: within 90 days after receiving notice of this Order, notifying Allstate Insurance Company, in writing, of his or her wish to rescind the release, and, within 30 days thereafter, tendering to Allstate Insurance Company repayment of any and all benefits received by the signer in exchange for signing the release.

3. Counsel for plaintiffs in the above-captioned actions shall submit to this Court for approval a proposed form of notice implementing the foregoing.

John P. Fullam, Sr. J.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 11, 2005

Before:

Hon. Richard D. Cudahy, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

No. 04-2310

Doris Isbell, Plaintiff-Appellant,

v.

Allstate Insurance Company, Defendant-Appellee.

ORDER

On consideration of the petition for rehearing en banc filed by petitioner-appellant, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Kansas City Area Office
400 State Avenue, Suite 905
(913) 551-5655
TTY (913) 551-5657
FAX (913) 551-6956

Charge No. 280A01133

Doris Isbell
365 Bunker Hill Road
Belleville, IL 62221

Charging Party

v.

Allstate Insurance Company
North Plaza
2775 Sanders Road
Northbrook, IL 60062

Respondent

DETERMINATION

I issue the following determination on the merits of the this charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e; et seq., ("Title VII"); the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 et seq., and the Americans with Disabilities Act, 42 U.S.C. 12101 et seq., ("ADA"). All requirements for coverage have been met.

Charging Party alleges that Respondent required that all employee-agents sign a waiver and release of all claims against Respondent, including all claims under Title VII, the ADEA and the ADA, in order to (1) remain as an insurance agent for Respondent, (2) receive an enhanced severance benefit upon the termination of their employment, or (3) to be able to sell their economic interest in their book of business. Charging Party also alleges that employee-agents who failed to sign the release and waiver were not allowed to continue as insurance agents for Respondent.

Respondent maintains that it implemented a reorganization of its business in order to convert all of its employee insurance agents to independent contractors. The reorganization was titled "Preparing for the Future Group Reorganization Program (the "Program"). Under the Program, Respondent acknowledges that in exchange for the employee-agents release and waive of all their claims under the ADEA, the ADA, and Title VII, (as well as other claims not enforced by the Commission) the agent could elect to become an exclusive independent contractor agent for Respondent (Option 1), convert to an exclusive independent contractor agent status and sell the economic or other interest in their book of business, (Option 2), or elect enhanced severance pay including reimbursement for expenses after the close of the agent's office (Option 3). Respondent admits that employee agents who did not sign a release and waiver were not allowed to continue as insurance agents for Respondent and would receive Respondent's normal severance benefits. It is undisputed that employee-agents who did not sign a release and waiver which included their claims under Title VII, the ADEA and the ADA by June 1, 2000, were not allowed to continue as an insurance agent for Respondent after July 1, 2000. The refusal of employee agents to release their claims under Title VII, the ADEA and the ADA and also constitutes the unlawful interference, coercion and

intimidation in the exercise and enjoyment of rights granted by the ADA.

Moreover, Respondent's threat to its employee-agents that they would lose their careers and livelihoods as insurance agents with Respondent if they did not release and waive their claims under Title VII, the ADEA and the ADA, constitutes unlawful retaliation against those individuals who signed releases and also constitutes the unlawful interference, coercion and intimidation in the exercise and enjoyment of rights granted by the ADA.

Upon finding that there is reason to believe that a violation has occurred, the Commission attempts to eliminate the alleged unlawful practice by informal methods of conciliation. Therefore, the Commission now invites you to join with it in a just resolution of this matter. Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 1601.26 of the Commission's Procedural Regulations.

If Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the Office Director is not obtained, the Director will provide this information and advise of the court enforcement alternative available to aggrieved person and the Commission.

A Commission representative will contact the Parties in the near future to begin conciliation.

On Behalf of the Commission:

SEP 19 2000
Date

s/ Lynn Bruner
Lynn Bruner
District Director